Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High-Speed	)	GN Docket No. 00-185
Access to the Internet Over	)	
Cable and Other Facilities	)	

COMMENTS OF THE COMPETITIVE ACCESS COALITION

The National Association of State Utility Consumer Advocates[1], the National Association of Towns and Townships,[2] the Citizen Utility Ratepayer Board of Kansas,[3] Citizen Power, Inc.,[4] the Utilities Commission, City of New Smyrna Beach, Florida,[5] Amigo.net,[6]

[1] NASUCA is an association of 41 consumer advocate offices in 39 states and the District of Columbia. NASUCA members are designated by laws of their respective states to represent the interest of utility consumers before state and federal regulators and in the courts. The Vermont Department of Public Service, a member of NASUCA, has not had sufficient time to review these comments and is therefore not a signatory hereto.

[2] The National Association of Towns and Townships(NATaT) has as its core purpose to strengthen the effectiveness of town and township government. It does so by educating lawmakers and public policy officials about how small town governments operate and by advocating policies on their behalf in Washington, D.C.

[3] The Citizen Utility Ratepayer Board of Kansas represents the interests of Kansas residential and small business consumers of electric, natural gas and telecommunication services.

[4] Citizen Power, Inc. is a non profit, public policy research, education and advocacy organization. Citizen Power has an interest in a number of important issues, including energy, health insurance, telecommunications, and transportation. Citizen Power's mission is to promote public understanding of, and involvement in, socio-cultural, economic and environmental issues and policy development. In furtherance thereof, Citizen Power will conduct research and make available objective, balanced information to all segments of the community, via the distribution of publications and participation in appropriate public forum.

[5] The Utilities Commission is a municipal utility providing electric, water and Internet service to the residents and businesses of the City of New Smyrna Beach, Florida. The Utilities Commission provides both dial up and DSL service, but without access to the local cable system cannot provide high speed access to its Internet service to those of its residents not accessible via DSL.

[6] Amigo.Net is an Internet service provider located in Alamosa, Colorado. Amigo.Net provides local dial up service to rural communities in an area covering approximately 1/3 of the State of Colorado. Over the past three years Amigo.Net has investigated high-speed access to the Internet through the use of XDSL technologies, cable and wireless links. Presently, Amigo.Net provides DSL services in three rural Colorado towns. While Amigo.Net is interested in extending DSL service to other rural communities, there are significant portions of its service area where deploying DSL technology at even the lowest DSL speeds is commercially impractical and even larger areas where it is infeasible to provide DSL at sufficient speeds to deliver broadcast quality video programming over the Internet. Amigo.Net's concerns are not academic. TCI is the cable provider in most of the rural communities also served by Amigo.Net. In 1996 and 1997, Ken Swinehart, president of Amigo.Net, contacted the local office of TCI to work on an arrangement to use the TCI cable plant to provide high-speed Internet access to Amigo.Net customers. After being referred to the main corporate office of TCI, he was informed that TCI would not let Amigo.Net use TCI's cable plant to provide high-speed access to the Internet.

NorthNet,[7] BrandXInternet LLC,[8] LABridge,[9] the Texas Internet Service Providers Association (TISPA),[10] and CyberZone[11] hereby submit their comments in response to the Commission's Notice of Inquiry adopted September 28, 2000 (the "*NOI*"). The commenters represent a broad coalition of parties interested in promoting competitive access to ISPs over high speed cable and other facilities. Most of these commenters are local governments, cable franchising authorities, or agencies charged by state or local law with advocating consumer interests in regulatory proceedings. As such they have an affirmative duty to protect the interests of consumers of telecommunications, cable and broadcast services in their respective localities and share the conviction that the interests of all consumers, and in particular those in rural and low income urban areas, are best served by regulations requiring open access to providers of broadband Internet services over cable systems. These commenters are collectively referred to herein as

[7] NorthNet is an ISP headquartered in Oshkosh, Wisconsin and providing dial up service in Fond Du Lac, Oshkosh, Mensasha, Neenah, Appleton, and Green Bay, Wisconsin. NorthNet is a full-service Internet provider offering a full range of Internet solutions for residential and business customers. Established four years ago, NorthNet also offers a suite of solutions including Website design, hosting, and information and telecommunication management services throughout northeastern Wisconsin. As detailed in the attached affidavit of NorthNet Marketing Director Stephen Heins, DSL access is largely unavailable to its subscribers and NorthNet has been refused access to Time Warner's cable system except on terms that are unreasonable and anticompetitive.

[8] BrandX is an ISP headquartered in Santa Monica, California and serving customers in southern California. It has been in business for six years and has a subscriber base of dial up, T1 and DSL customers. As detailed in the attached affidavit of BrandX President James Pickrell, *Attachment 20*, DSL access is unavailable to many of its subscribers and BrandX has been refused access to Time Warner's and Adelphia's cable systems except on terms that are unreasonable and anticompetitive.

[9] LABridge is an ISP headquartered in Marina Del Rey, California and serving customers in southern California offering Internet service via dial up and DSL. Without access to cable systems LABridge will find it difficult to compete for customers increasingly desirous of high speed connections to the Internet.

[10] TISPA is an industry association that represents the interests of the approximate 600 ISPs in Texas. As detailed in the affidavit of W. Scott McCollough, TISPA sought to negotiate a template open access agreement with Time Warner that could be adopted by Texas ISPs. Time Warner refused to work with the Association and insisted on directly negotiating with each Texas ISP, even though many ISPs lack the ability or bargaining power to individually strike a reasonable bargain with the cable giant.

[11] CyberZone is an ISP serving Marinette and Oconto Counties in Wisconsin and Menominee County, Michigan. It has been in business for five years and has a subscriber base of over 5000 customers. As detailed in the attached affidavit of CyberZone President Raymond Williams, DSL access is largely unavailable to its subscribers and CyberZone has been refused access to Time Warner's cable system except on terms that are unreasonable and anticompetitive.

"state consumer advocates." In addition, these commenters are joined by several independent Internet Service Providers ("ISPs") whose competitive interests are also at stake in this proceeding. The state consumer advocates and the ISPs joining these comments are referred to herein as the "Competitive Access Coalition."

EXECUTIVE SUMMARY

The Commission's notice of inquiry has been prompted by the decision last spring of the U.S. Circuit Court of Appeals for the Ninth Circuit in *AT&T Corporation, et al. v. City of Portland.*[12] Cable modem service, it held, is a telecommunications service and cable companies offering cable modem service therefore must do so on terms that are just reasonable and non-discriminatory, unless the Commission is able to conclude that it can forbear from regulating that service. The Commission, as these comments explain, is bound to honor that ruling. And, since there is no basis on which the Commission can satisfy the statutory standards for forbearance under 47 U.S.C. § 160, it *must* enforce open access to cable systems by independent ISPs on terms that are no less favorable than those on which they provide access to themselves or their ISP affiliates. That is the requirement imposed by Sections 201 and 202 of the Communications Act, which mandates that common carriers provide service at rates and on terms that are just, reasonable and not unduly discriminatory.[13]

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[12] 216 F.3d at 871 (9th Cir. 2000).

[13] Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), provides in relevant part that " [a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful."

Companion Section 202(a), 47 U.S.C. § 202(a), makes it "unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

Continuation of the Commission's "hands-off" policy on regulation of cable modem services (*NOI* p. 4) cannot be squared with the statutory command to regulate telecommunications service. Absent an affirmative, written and reasoned decision to forbear, the Commission lacks a legal basis to deregulate by inaction. But open access is not only required by law, it is sound public policy that will advance the deployment of high speed telecommunications services, while also preserving competition in the distinct market for provision of Internet services. The central points underlying our conclusions are summarized below:

1. The Ninth Circuit has already decided that the Commission is obligated under 47 U.S.C. §§ 201, 202 and 251(a) to ensure that when cable companies offer access to ISPs they do so under rates and terms that are just, reasonable and not unduly discriminatory—unless the agency is able to determine that it is appropriate to forbear from regulating the cable companies as telecommunications providers.

2. There is no legal or logical basis for forbearance under 47 U.S.C. § 160. First, because cable companies have substantial market power in the provision of high speed access, forbearance would diminish rather than promote competition, contrary to the purpose of the 1996 Communications Act. Second, there is no principled basis on which to forbear from regulating cable companies when the Commission continues to regulate access by telephone companies to competing DSL providers. Forbearance under such circumstances would violate the Commission's own policy of technological neutrality: DSL and cable modem service are both forms of high speed telecommunications service. Forbearance both from the regulation of cable modem service *and* from the regulation of access to DSL is not a way to preserve neutrality

either, particularly since the Commission has only recently determined that its rules governing DSL access needed to be strengthened, not abandoned.

3. The Commission's "hands-off" policy has been a failure. There is no evidence that, left to their own devices, cable companies will provide access to their competitors voluntarily, much less on terms and at rates that are reasonable. Indeed, the only offers of access to unaffiliated ISPs that have been made to date—by AT&T and Time Warner—have either been made under threat of regulatory action or in an effort to gain approval of mergers from antitrust enforcement authorities or from the Commission itself. Even those offers have been on terms that would limit content competition or prevent ISPs from competing in the video content markets. The access rates, moreover, would create a "price squeeze" that would edge out the cable affiliate's ISP rivals.[14] Other cable companies like Adelphia and Comcast continue to oppose access outright, or have insisted on anticompetitive tying agreements conditioning the purchase of unaffiliated ISP service to the purchase of the cable affiliate's ISP service or other services offered by the cable operator.[15]

4. Commission should declare unenforceable as anticompetitive the exclusive dealing provisions of agreements that the cable companies have executed with their affiliates. Modification of unjust and unreasonable contract terms is wholly within the Commission's powers. *Puerto Rico Telephone Co*., 92 FCC2d 274 ¶ 36 (1983) (striking down exclusive dealing

[14] Indeed, the only deal reached to date by Time Warner was with EarthLink, a severely weakened rival "which absorbed a loss of $41.7 million in its latest quarter, excluding acquisition and merger-related costs." "FTC vote on AOL merger in Doubt," Washington Post, E10 (November 30, 2000). (Earthlink's SEC filings indicate that its losses over the last nine months were a staggering $240 million.) This fact, the Washington Post reports, has led FTC officials to question whether EarthLink has accepted unfavorable terms because it felt "pressured to strike a deal." *Id.*

[15] Just days before the comment date in this proceeding, the Washington Post reported that Comcast had struck a deal of undisclosed terms with Juno. In antitrust cases such deals, made under the threat of government action, are traditionally, and appropriately, accorded little weight by the courts. The Commission should not place any stock in such arrangements either.

arrangement in contract); *MCI v FCC*, 665 F.2d 1300 (D.C. Cir. 1981); *In The Matter Of Promotion Of Competitive Networks In Local Telecommunications Markets*, CC Docket No. 96-98, 2000 WL 1593327 (Oct. 25, 2000), ¶¶ 25-27; 163-64. Such relief is needed, moreover, where, as here, the exclusive dealing provisions are tainted by the monopoly power of the cable companies. *See, e.g., Associated Gas Distributors v. FERC*, 824 F.2d 981, 1017 (D.C. Cir. 1987) (interpreting comparable provisions of the Natural Gas Act to modify contracts that were the product of the pipelines' monopoly power.) As AT&T has stated, not only does the Commission have the power to void exclusive dealing provisions in contracts currently in effect (*Promotion Of Competitive Networks In Local Telecommunications Markets, supra* at ¶ 35), such provisions perpetuate barriers to entry. *Id.*

COMMENTS

I. Cable Modem Service Is a Telecommunications Service That Is Subject to Title II of the Telecommunications Act (NOI ¶ ¶ 2, 13-24).

The development of technology permitting cable service operators to provide cable modem services to the public over the cable television network signals a dramatic qualitative change in the very nature of the services offered by the cable industry.[16] The advent of this technology has resulted in the evolution of the cable industry from the one-way transmission of video broadcasts to the provision of telecommunication services for the transmission of voice, data and video communications. Because cable modem services now permit cable operators to provide the very same services to the public as those provided by traditional telecommunications

[16] The Commission's Notice of Inquiry in *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185 ("NOI") notes that several terms are used interchangeably to describe high-speed services using cable modem technologies. NOI at p. 1, n. 1. For purposes of these Comments, the term "cable modem service" is used in the same fashion as that employed by the Commission in the NOI. All other terms are intended to have the same definitions as used in the Communications Act, 47 U.S.C. §§ 153, 251, and 522.

carriers, the public policies governing the regulation of telecommunications carriers must now be applied to cable operators. For this reason, cable operators who provide cable modem services must be regulated under Title II of the Telecommunications Act.[17]

Traditionally, cable operators have offered the public retransmission of television broadcast programming and other video programming. These cable services permitted the public access to an array of programming broader than that available from ordinary broadcasting as a result of their ability to avoid distance, weather and other technical limitations inherent in ordinary broadcasting. These services, however, were characterized by their one-way nature. Indeed, Congress recognized this fundamental distinction in cable services when it established the regime for their regulation:

[T]he term cable service means –

(A) the one-way transmission to subscribers of (i) video programming or (ii) other programming service, and

(B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.[18]

With the introduction of cable modem services, however, the very nature of the service offered by cable operators has changed. Cable modem services permit the subscriber to interactively communicate on a two-way basis over the cable network to the Internet and other information service networks. Conceptually, this two way communication is not limited to the Internet. Cable modem technology will similarly permit the transmission of voice and data services over the cable network, just as those services are now-transmitted over the public

[17] 47 U.S.C. §201, *et seq.*

[18] 47 U.S.C. §522(6)

switched telephone network. Importantly, these services are indistinguishable to the consumer regardless of the medium over which they are provided. Consequently, cable modem services are within the statutory and regulatory definitions of "telecommunications services" and the courts who have addressed the issue have correctly categorized cable modem services as telecommunications services.

A. Cable modem services are within the statutory definition of "telecommunications services."

In contrast to the definition of cable services, the statutory definition of telecommunications service focuses on the exchange of information between points:

> The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public regardless of the facilities used.[19]

The Communications Act goes on to define "Telecommunications" as:

> The transmission between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.[20]

Lastly, the Act describes "Telecommunications carrier" as:

> Any provider of telecommunications services, except the term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.[21]

These definitions identify a number of characteristics, in addition to the two-way nature of transmission, that distinguish cable services from telecommunications services from a regulatory perspective. First, Congress recognized that telecommunications services could and

[19] 47 U.S.C. §153(46)

[20] 47 U.S.C. §153(43).

would be provided by a wide variety of media and technologies by broadening the definition of telecommunications to describe its nature, *regardless of the facilities used.* 17 U.S.C. § 153(46). Thus, the fact that cable modem services are transmitted over the cable network rather than the public switched telephone network does not determine whether they are telecommunications services for purposes of their regulation under the Communications Act.

Second, Congress recognized that the same technology could be used for multiple purposes, some of which might be within the scope of Title II of the Communications Act and some of which might be subject to other provisions of the Act or completely beyond the Act's jurisdiction. Section 153(44)'s definition of "telecommunications carrier" specifically contemplates that providers of telecommunications services shall be regulated as "common carriers" only to the extent that they "are engaged in providing telecommunications services." Consequently, the Communications Act contemplates that, in the case of cable operators, some activities may be subject to regulation as telecommunications pursuant to Title II while other activities may be subject to regulation as cable services under Title V.

Lastly, the statutory definitions recognize that the fundamental characteristic of telecommunications is the degree of control afforded the user. The definition focuses on the transmission between and among points *specified by the user* of information *of the user's choosing*. This is distinguished from the traditional argument made by cable carriers that it is they and not their subscribers who are determining the content and source of their programming. Because cable modem services place the power to determine the content of the communication with the user and not the provider, they have transformed the cable carrier from a broadcaster

[21] 47 U.S.C. §153(44).

that controls both the transmission and the content to a conduit by which the user can determine the information platform it accesses.

A synthesis of these definitions demonstrates that cable modem services come within the scope of the statutory definition of telecommunications services. Cable modem services provide a means by which a subscriber can transmit information of the subscriber's choosing to points designated by the subscriber. Cable modem services permit their subscribers to transmit and receive e-mail from others, even individuals who are not subscribers, located anywhere in the world. Similarly, cable modem services permit their subscribers to access the Internet which, in turn, permits the subscriber to engage in a plethora of interactive activities such as retail shopping, Internet chat rooms, and voice communications. All of these activities are far beyond the passive receipt of video programming that has been the traditional domain of the cable operator and the statutory definition of cable services set forth at 47 U.S.C. §522.

Title V of the Communications Act also recognizes that cable operators might provide telecommunications services, in addition to cable services over a cable network. 47 U.S.C. §541(b)(3) provides:

> If a cable operator or affiliate thereof is engaged in the provision of telecommunications services –
>
> (i) such cable operator or affiliate shall not be required to obtain a franchise under this title for the provisions of telecommunications services; and
>
> (ii) the provisions of this title shall not apply to such cable operator of affiliate for the provision of telecommunications services.

Thus, Title V creates a specific exception to the local regulation of cable operators to the extent they offer telecommunications services. This exception manifests Congress' intent that telecommunications services offered by cable operators, such as cable modem services, not be regulated as cable services, but rather, as telecommunications services under Title II.

Cable modem services serve as a conduit by which the cable operators' customers access the Internet other information platforms with complete control over the nature and content of the information they obtain. These cable modem services are offered by cable operators to the public within the cable operator's service area for a fee. Thus, cable operators are telecommunications carriers and must be treated as common carriers to the extent they provide cable modem services. More importantly, cable modem services are telecommunications services and must be subject to the same provisions of Title II of the Communications Act that are applied to more traditional telecommunications technologies.

B. The Courts Have Recognized That Deployment of Cable Modem Services Have Transformed Cable Operators Into Telecommunications Carriers.

Citing *City of Portland, supra, Gulf Power Co., et al. v. FCC*[22], and *MediOne Group, et al. v. County of Henrico*[23] the NOI refers to "recent federal court opinions that have classified cable modem service in varying manners." *NOI* ¶ 2. *See also NOI* ¶ 13. Those cases, however, are not in conflict. They are all consistent with the ruling in *City of Portland*, 216 F.3d at 876, that the provision of Internet service over cable is a telecommunications service within the meaning of 47 U.S.C. §153. Those cases, read together, answer the following question posed in the NOI:

> [I]f a cable operator simultaneously offers a telecommunications and information service, should we, for definitional purposes, sever the underlying telecommunications, or the telecommunications service, from the information service offering?

NOI ¶ 23.

[22] 208 F.3d 1263 (11th Cir. 2000).

[23] 97 F.Supp.2d 712 (E.D. Va. 2000).

The answer all those cases provide, directly or implicitly, is "yes." A brief discussion of these cases makes this point abundantly clear.

In *City of Portland*, the Ninth Circuit held that when a cable operator offers a service like @Home, it is providing both an unregulated information service and a regulated telecommunication service[24]:

> Under the statute, Internet access for most users consists of two separate services. A conventional dial-up ISP provides its subscribers access to the Internet at a 'point of presence' assigned a unique Internet address, to which the subscribers connect through telephone lines. The telephone service linking the user and the ISP is classic "telecommunications," which the Communications Act defines as 'the transmission, between or among points specified by the user, of information of the user's choosing, without changing the form or content of the information as sent and received.' 47 U.S.C. §153 (43). A provider of telecommunication services is a "telecommunications carrier," which the Act treats as a common carrier to the extent that it provides telecommunications for the public, 'regardless of the facilities used.' 47 U.S.C. §153 (44) & (46).
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> * * *
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> Like other ISPs, @Home consists of two elements: a 'pipeline' (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs @Home controls all the transmission facilities between its subscribers and the Internet. To the extent @Home is a

[24] There, a cable operator challenged a decision by a local franchising authority to condition the transfer of a cable franchise upon a grant of unrestricted access by Internet service providers to the cable operator's cable modem services. The court struck down the condition. The court's holding, as noted earlier, was predicated on the conclusion that cable modem services are telecommunications services and not cable services. Again, the court correctly focused on the two-way characteristic of telecommunications and the degree of control afforded the subscriber:

The essence of cable service, therefore, is one-way transmission of programming to subscribers generally.

This definition does not fit @Home [the cable operator's cable modem service]. Internet access is not one-way and general, but interactive and individual beyond the "subscriber interaction" contemplated by the statute [47 U.S.C. §522(6)]. Accessing Web pages, navigating the Web's hypertext links, corresponding via e-mail and participating in live chat groups involve two-way communication and information exchange unmatched by the act of electing to receive a one-way transmission of cable or pay-per-view television programming. And unlike transmission of a cable television signal, communication with a Web site involves a series of connections involving two-way information exchange and storage, even when a user views seemingly static content. Thus, the communication concepts are distinct in both a practical and a technical sense. Surfing cable channels is one thing; surfing the Internet over a cable broadband connection is quite another.

216 F.3d 876-77.

> conventional ISP, its activities are that of an information service. *However, to the extent that @Home provides it subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.*

216 F.3d at 878 (emphasis added)[25].

Gulf Power Company v. FCC, 208 F.3d 1263 (11th Cir. 2000), the second of the cases cited by the Commission, is entirely consistent with *City of Portland*. The petitioners in *Gulf Power* had challenged "the FCC's statutory authority to regulate attachments for Internet service under the Act." 208 F.3d at 1275-76. The court agreed, finding that "the FCC has no authority under that Act to regulate Internet service providers" because the 1996 Act "allows the Commission to regulate the rates for cable service and telecommunications service: the Internet service is neither." *Id.* at 1276. Indeed, the court expressly rejected the argument that Internet service provided by a cable television system could be considered a cable service[26]. *Id.* On the contrary, it noted, as has the Commission in *Internet Ventures*, *supra*, that cable service only involves the one way transmission of either "video programming or other programming service." *Id.* at 1276 (citing 47 U.S.C. §522(6)(A), (B)). In short, as did the Ninth Circuit, the Eleventh Circuit concluded that when a cable company is carrying Internet service, it is not providing a cable service. The only "distinction" between the two cases is that in the latter case the court did not reach the question—because it was not asked—whether the transmission component of bundled Internet service provided by a cable company is telecommunications service. That the cable companies did not pose this question is no surprise. Electric utilities are required to

[25] The court also noted that the categorization of cable modem services as telecommunications is consistent with the regulatory regime established by the Communications Act and this Commission. It results in similar services being subject to the same regulatory strictures regardless of the technology used to transmit those services. *Id.*

[26] The court specifically noted that the categorization of the Internet service as a telecommunications service was not raised on appeal because the FCC had concluded that Internet service, as opposed to cable modem service, was not a telecommunications service. *Id. at* 1277.

provide pole attachments to telecommunications carriers but the cable companies have been fighting tooth and nail to avoid having the transmission service they provide to ISPs characterized as a telecommunications service.

Finally, the lower court decision cited by the Commission, *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712 (E.D. Va. 2000), also reaches conclusions consistent with the *Portland* case. There, as in the *Portland* case, the cable company had challenged a local cable regulator's authority to condition a franchise transfer on the cable operator's agreement to provide open access to unaffiliated ISPs and, as in the *Portland* case, the court concluded that the cable regulator had no such authority because access to Internet providers was a telecommunications service, not a cable service:

> Congress has explained that under the statute, "[t]he term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." '47 U.S.C. §153(43). The Henrico Ordinance requires MediaOne to provide 'its cable modem platform' facility to any requesting ISPs 'unbundled from the provision of content' which the ISPs themselves supply. Ordinance §§1(c), 2. Under the Ordinance, MediaOne would be forced to operate its cable modem platform to provide transmission between the points selected by requesting ISPs and their customers, without change in content. *The County is therefore requiring MediaOne to provide a telecommunications facility as a condition for the approval of the transfer of control, and accordingly, the Ordinance is in violation of section 541(c)(3)(D).*

97 F. Supp. 2d at 714. (Emphasis added.)

To be sure, there is some incongruity in the *Henrico* court's opinion. Having concluded that Henrico could not order MediaOne to provide a telecommunications service—access to competing ISPs—it also concluded that ISP service "falls under the statutory definition of 'cable service.'" 97 F. Supp. 2d at 715. It then went on, citing a 1979 case, to conclude that cable systems cannot be required to carry the services or programs of unaffiliated programmers. *Id.*

Access to Internet service providers cannot be both a cable and a telecommunications service. There is, in any event, no credible argument that the *Henrico* court's opinion could be sustained on this alternate, and contradictory ground. First, the court's opinion that cable companies cannot be required to provide access to unaffiliated programmers is based on a 1979 case that predates changes in the Communications Act giving the FCC precisely that authority. The leased access provisions of the Act, Section 612, were added in 1984 and strengthened again in 1992 to require that cable companies lease channels to unaffiliated video programmers on reasonable, non-discriminatory terms. *See* 47 U.S.C. §532. In other words, Henrico's open access conditions could not have been invalidated on the grounds that cable regulators have no authority to force cable companies to provide access to their competitors. Plainly, they do. The problem is that the Act, 47 U.S.C. § 522(6), defines cable service as "one-way transmission to subscribers of (i) video programming, or (ii) other programming" and "subscriber interaction, if any, which is required for the selection or use of video programming or other programming service." Since the FCC has already found in *Internet Ventures, Inc.*, File No. CSR-5407-L (Feb. 18, 2000), issued several months before issuance of the *Henrico* case, that ISPs do not provide "video programming"[27] and since the Eleventh Circuit has already held in *Gulf Power*, *supra*, that ISPs do not provide "other programming,"[28] ISPs are simply *ineligible* for cable service.

In short, the only basis upon which the *Henrico* decision can be sustained is the same one that *both* the *Henrico* court and the Ninth Circuit advanced, *i.e.*, that cable access to ISPs is a telecommunications service.

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[27] *Internet Ventures, supra*, ¶ A13-14, (ISP service is not "video programming").

Other courts have also been called upon to address the distinction between cable services governed by Title V of the Communications Act and telecommunications services regulated under the authority of Title II of the Act. They, too, have embraced the analysis described above.

In *National Cable Television Association, Inc.*[29] the U.S. Circuit Court of Appeals for the District of Columbia considered a Commission determination that telephone companies seeking to offer a service called "video dial tone" were not within the scope of the provisions of Title V of the Communications Act affecting cable operators.[30] In this instance, a cable industry trade association challenged the Commission's conclusion that video dial tone was a telecommunications service subject to Title II and not a cable service. In affirming the Commission's conclusion, the Court of Appeals recognized that the distinction between cable services and telecommunications services is the control over the content and destination of the transmissions:

> As the commission pointed out in the first instance—and we agree—study of the statutory scheme makes it quite clear that video dial tone service and cable service are very different creatures: video dial tone is a common carriage service, the essence of which is an obligation to provide service indifferently to all comers—here, to provide service to all would-be video programmers. On the other hand, cable operators exercise "a significant amount of editorial discretion regarding what their programming will include." (citations omitted) Attempting to regulate a telephone company's video dial tone offering under the strictures of the Cable Act simply makes no sense in any respect, and would be infeasible in many aspects.[31]

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[28] *Gulf Power, supra*, 208 F. 3d at 1277 ("we cannot read the language 'other programming' broadly to include Internet services.")

[29] 33 F.3d 66 (D.C. Cir.1994).

[30] Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry, 91-334, 7 FCC Rcd. 300 (1991).

[31] 33 F.3d at 75.

The court went on to conclude that a telephone company offering video dial tone was exempt from the Cable Act because it was a common carrier *subject to regulation under Title II*.[32]

This same reasoning should now apply in the reverse as cable operators begin to offer their subscribers access to the Internet over the cable network. Telephone companies in 1991 were seeking to provide access to television programming over the public switched telephone network that afforded their customers complete control over the content of the information they received. Now cable operators are providing access to the Internet that gives subscribers complete control of the information they receive. Just as the telephone companies' facilities were a conduit for video programming selected by the customer, so the cable networks are now a conduit for content selected by their subscriber. That is the essence of the difference between cable service and telecommunications service.[33]

Through the Federal Communications Act, Congress intended to make available to all people of the United States a rapid, efficient, reasonably priced communications service.[34] The 1996 Telecommunications Act was intended to accelerate rapid deployment of advanced telecommunications technologies and services to all Americans by opening all telecommunications markets to competition.[35] These public policies resulted in a regulatory architecture for telecommunications carriers that embodies dual duties of nondiscrimination and interconnection.[36]

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[32] *Id.*

[33] *Id.* at 71-72.

[34] *Cooperative Communications, Inc. v. AT&T Corp.*, 867 F.Supp. 1511 (D. Utah 1994).

[35] *Sprint Spectrum L.P. v. Jefferson County*, 968 F.Supp. 1457 (N.D. Ala. 1997).

[36] *City of Portland*, *supra* at 879.

As noted above, cable modem services clearly are telecommunications services for purposes of the Communications Act. Consequently, the same public policies applied by Congress in the Communications Act to traditional telecommunications providers are equally applicable to cable operators who offer cable modem services. Because cable modem services are equivalent to advanced telecommunications services offered by traditional telecommunications providers, cable operators must, to the extent that they offer cable modem services, be required to play on the same field as that on which other, similarly situated telecommunications providers compete. Any other result will defeat the public policies of competitive neutrality and equal opportunity among competing technologies that are the guiding principles of current telecommunications regulation.

B. ISP Access Is Not a Cable Service.

1. A Cable Service Involves Only Transmission of Video Programming or Other Programming. This Commission and the Courts Have Held That Internet Service is Neither.

As noted earlier, both the Commission and the courts have already ruled that ISP access to cable modem service and/or cable modem platform is not a cable service. Section 522 of the Act defines the term "cable service" as:

> (1) the one way transmission to subscribers of (i) video programming, or (ii) other programming service, and
>
> (2) subscriber interaction, if any, which is required for the selection or use of such video programming or other video programming service.

47 U.S.C. §522(6).

"Video programming" under the Act refers to "programming provided by, or generally considered comparable to, programming provided by a television broadcast station." 47 U.S.C.

§522(20). In *Internet Ventures, supra* the Commission held that Internet service is not video programming.

Nor is Internet service "other programming," which the Act defines as "information that a cable operator makes available to all subscribers generally." 47 U.S.C. §522 (14). *Gulf Power*, 208 F.3d at 1277. Because Internet service is neither "video programming" nor "other programming," its transmission is not a cable service.

2. The "Or Use" Provisions of the Act Do Not Qualify Transmission of Internet Service as a Cable Service.

Irrespective of whether Internet service is "video programming" or "other programming," cable transmission of Internet service is not "one-way transmission." The term "one-way transmission" is not defined in the Act, but it connotes, in general, a flow (*i.e.* transmission) of signals in one direction from the originator (or intermediary transmitter) of the signals to the receiver of the signals. Thus, for a service to be considered a cable service, the service must (1) be a one-way transmission, (2) be a type of programming and (3) require subscriber interaction for the selection or use of such programming.

While traditional cable television programming fits the mold of cable service, cable-delivered Internet does not. On a cable system, the cable headend facilities receive video signals transmitted by satellites and broadcast television towers. The signals are then sent simultaneously from the headend facilities over coaxial cable to the subscribers' premises. The programming embodied in the video signals is generally the same as the type of programming provided by a television broadcast station. *Internet Ventures, supra*. In addition, as has been recognized by both the Commission and the courts, the transmission of cable television programming is a one-way transmission of video programming requiring little, if any, subscriber interaction. *City of Portland*, 216 F.3d at 876 (cable or pay-per-view television programming is

a one-way transmission); *Telephones Company-Cable Television Cross-Ownership Rules*, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd. 5781, 75 (1992)(the "*Second Video Dialtone Order*") (one of the key characteristics of the programming generally offered by cable networks is one way "*i.e.* it provides no opportunity for viewer interaction, manipulation or customization."). Conventional cable television programming therefore qualifies as cable service under the Act.

The numerous functionalities offered by the cable-delivered Internet, however, defy the traditional notions of cable service because both the transmitted content and the transmission process are more dynamic and more interactive than video programming offered via cable. To establish a cable-facilitated Internet connection, at the subscriber end, the subscriber connects his or her computer to a cable modem. The cable modem is connected to coaxial cable that runs from the subscriber's premises to the cable operator's headend facilities. The headend facilities connect to an ISP, which then connects to the Internet backbone. With access to the Internet, the subscriber can visit web pages, send and receive electronic mail and participate in numerous other interactive activities. The transmission in this regard is two-way.

The *City of Portland* court recognized the stark differences between transmission of cable television programming and transmission of Internet services provided via a cable modem. The court observed that

> Accessing web pages, navigating the Web's hypertext links, corresponding via e-mail, and participating in live chat groups involve two-way communication and information unmatched by the act of electing to receive a one-way transmission of cable or pay-per-view television programming.

City of Portland, 216 F.3d at 876.

The Commission itself has refrained from broadly categorizing interactive or two-way transmissions as within the definition of cable service. In the *Second Video Dialtone Order,* it states:

> We conclude that Congress intended for video services involving such complex viewer interaction generally to fall outside the scope of "video programming" since they would not be comparable to the programming provided by broadcast stations and others ....

Id. at 875.

The Commission illustrated:

> Under our interpretation, the offering of a shopping service comparable to a "video catalogue" whereby the consumer can electronically request specific information and order goods and services would not constitute prohibited video programming, even if the service incorporated video images. In such a case, the video images would not be severable from the interactivity. On the other hand, simply enabling the consumer to order a product electronically would not alter the nature of the underlying video programming, such as the home shopping programs carried by cable and broadcast stations in 1984. We also conclude that programming that includes multimedia graphics and information services that incorporate video images generally would not be video programming because the video images are not severable from the program service.

The court's decision in *Gulf Power, supra*, supports this conclusion. First, as that court noted, the words "or use" were added to the statute as part of the 1996 amendments. Those words represent the only difference between the definition of cable service under the 1978 version of the Act and the current amended language. Congressional intent as to the basis for the addition is sketchy as the record indicates only relevantly that the addition was intended to "reflect the evolution of video programming toward interactive services." *Gulf Power,* 208 F.3d at 1276 (quoting H. Rep. No. 104-204 at 97, reprinted in 1996 U.S.C.A.N. at 64). One could not conclude from such a bare minimum explanation that Congress intended to expand the statutory definition of cable service to include services which fit the definition of telecommunications services. *Id.* at 1276-77. As the court correctly surmised in *Gulf Power*:

> If Congress by the addition of these two words meant to expand the scope of the "cable service" definition from its traditional video base to include all interactive services, video and non-video, it would have said so. Without any substantive comment, we will not read this minor change to effectuate a major statutory shift.

208 F.3d at 1277 (citing *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 318 (1985) (stating that in general, a change during codification without substantive comment does not alter a statute's scope).

The Commission's decision in *Internet Ventures* further supports this point. *Internet Ventures* involved a petition by an ISP for a Commission ruling that ISPs were entitled to commercial leased access under Section 612 of the 1934 Act. The ISP in that case argued that "streaming" technology as used by ISPs to deliver television broadcast stations fell within the definition of video programming. The Commission believed otherwise, concluding that "video programming" as defined under the Act did not include data or interactive services as provided via the Internet. *Internet Ventures, supra* at ¶ 13. The Commission based its decision, in part, on the view that when Congress initially adopted the definition of video programming, it did not contemplate the inclusion of two-way transmission or interactive services in that definition because such services were virtually non-existent at that time. Had Internet service constituted video programming, in fact, ISPs would have been entitled to non-discriminatory access to cable systems already under the leased access provisions of the Act. The fact is, however, that in *Internet Ventures, supra*, the Commission rejected that argument, which had been supported by several parties to this pleading.

It is evident from the forgoing that the addition of the words "or use" does not expand the meaning of video programming. Nor can the term "other programming" be expanded to include cable modem service or the cable modem platform. Like the term "video programming," the term "other programming" has been part of the definition of "cable service" since 1978 - when

the Internet was nothing but a military research tool. Congress therefore could not have intended then for the term "other programming" to encompass the Internet, which at that time, was not a subject of regulation. *Gulf Power*, 208 F.3d at 1277.

C. Transmission of Internet Service over Cable Facilities Is a Common Carrier Service.

One of the implications of offering cable modem services and their two-way communications controlled by the user to the public is that the cable operator's network becomes a conduit for two-way communications and the cable operator becomes a common carrier subject to the regulations applicable to other common carriers.

The Communications Act defines "common carrier" as:

> Any person engaged as a common carrier for hire in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission…[37]

As demonstrated above, the cable operator who offers cable modem services is offering to its customers a mode for transmitting communication over the Internet that is outside the control of the cable operator. By virtue of the cable modem service, the subscriber has access to Web sites hosted all over the world. By directing his Web browser to a particular address or Web site, the subscriber and not the cable operator dictates the ultimate termination point for the means of communication offered by the cable operator. This two-way communication is transmitted over the cable operator's wire line network. The cable operator offers the service to the public for a standard fee. Thus, all of the elements set forth in the statutory definition are satisfied.[38]

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[37] 47 U.S.C. 153(10).

[38] The telephone industry is currently engaged in a controversy as to whether telephone traffic bound for an Internet service provider is local or interstate traffic for purposes of reciprocal compensation under Title II of the Communications Act. Incumbent local exchange carriers maintain that ISP bound traffic is interstate in nature because an end – to – end analysis suggests that the ISP provider is merely an interim point in the line of communication that ultimately terminates at a Web site hosted any where in the world. Competitive local exchange carriers argue that the termination point of ISP bound traffic is the ISP providers' modem which most often is within the same local calling area as the point of origination. The ultimate resolution of that issue may have a bearing on

Moreover, the Communications Act mandates that telecommunications carriers be treated as a common carrier regardless of whether they satisfy the statutory definition of a "common carrier".[39] Thus, it is clear that the cable operator who offers cable modem service should be subject to the same regulations applicable to other telecommunications carriers and common carriers.

The NOI asks whether the fact that cable subscribers may select only those ISPs with which the cable company has an interconnection agreement is relevant to determining whether the cable company is offering a common carrier service. (*NOI* ¶ 18) The question turns the notion of common carriage on its head. Incumbent local exchange carriers (ILECs) are common carriers obligated to provide unaffiliated ISPs non-discriminatory access to ILEC DSL services. Unaffiliated ISPs, in turn, must have agreements with the ILECs in order to connect with those ILECs *and in order for the customer to select a particular ISP*. If the absence of ILEC agreements with unaffiliated IPSs could relieve ILECs of common carrier obligations, then refusals to grant access to such ISPs would become the *justification* for denying the customer the right to select that ISP. This is as silly as it sounds.

The fact that cable subscribers cannot select ISPs other than those that have agreements with the cable operator is irrelevant to determining whether cable-delivered Internet is a common carrier offering. That fact, however, is essential to the inquiry whether the cable operator, as a provider of telecommunications service, is meeting its statutory obligation. By prohibiting cable subscribers' access to non-affiliated ISPs, the cable operator is violating the statutorily imposed open access obligation of telecommunications service providers.

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whether cable modem services offered by a cable operator are interstate in nature. It does not, however, affect the conclusion that cable modem service is a telecommunications service.

[39] 47 U.S.C. §153(44).

II. Commission's Present "Hands-Off" Policy Will Not Adequately Protect the Public Interest (NOI ¶ ¶ 34-42, 51-56).

It is wrong, we submit, to refer to the Commission's present "hands-off" policy as a "market-based approach." *NOI* ¶¶ 35-37. While it should be the goal of Commission policy to promote the development of broadband Internet service in accordance with free-market principles, that does not mean that companies in control of the choke-point in the telecommunications structure supporting that service should be left free to impose their own restraints. To the contrary, the principle of free competition means that the Commission has an important role to play in ensuring that the cable infrastructure provides a competitive and market-based environment for the development of that service along lines that best serve the needs and desires of its users.

We cannot overemphasize the importance of rejecting an open access approach that relies on "achieving openness through negotiated commercial agreements between cable operators and unaffiliated ISPs." *NOI* ¶ 29. The Commission's belief that a "hands-off" policy would achieve reasonable open access unfortunately has not been vindicated by events. On the contrary, as of this writing, the only movement toward open access in the last several years—and a barely perceptible movement at that—has been the non-binding offers of AT&T and Time Warner to negotiate access agreements with unaffiliated ISPs when their exclusive dealing arrangements with affiliates expire and two reported eleventh hour agreements between Time Warner and Earthlink and between Comcast and Juno.[40]

[40] Time Warner's agreement with Earthlink, the subject of several recent press accounts, remains confidential. The terms of Comcast's agreement with Juno - - an agreement reported in the November 29, 2000 edition of the Washington Post, "Comcast, Juno Make Deal to Sell Net Access," - - are also unknown at this time. As we note *infra*, it is settled antitrust doctrine that these agreements should be given scant weight since they come in the midst of government investigations into the competitive practice of cable companies. *See, e.g., U.S. v. Continental Can Co.*, 378 U.S. 441, 463 (1964).

A. Reliance on Negotiated Arrangements Will Not Lead to Open Access.

Over the last several years, the Commission has expressed in numerous speeches by its staff and by commissioners a reluctance to invoke its powers to mandate open access and its confidence that, left to its own devices, the market would deliver open access. The NOI refers to this approach as the Commission's "hands-off policy." *NOI* at ¶ 4. Unfortunately, the experience to date with reliance on voluntary negotiations of open access arrangements has been a failure. Indeed there is no credible basis to conclude that, left to their own devices, cable companies owning their own ISPs would be willing to negotiate voluntary, non-discriminatory arrangements with their competitors.

Virtually from the outset of the debate, those hopeful of voluntary solutions, but objective about the results, would have seen the futility of a do-nothing, or to use the Commission's words a "hands-off," approach. Not only is the notion that cable companies would refrain from exploiting their monopoly power counter-intuitive; it is contrary to economic theory and to the policies pursued by the Commission and the antitrust enforcement agencies in similar contexts.

Any company, in the legitimate pursuit of its self-interest, will seek to exploit its control over a scarce resource. This is no criticism of the companies that find themselves in such a position or of the individuals who make decisions for them. To the contrary, a company failing to act in a profit-maximizing fashion would properly invite suspicion from its shareholders, customers and business associates as well as government authorities. It is natural for companies

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Equally important is that Comcast's announced agreement with Juno is to take effect even though Comcast's exclusive dealing arrangement with its affiliate Excite Home runs through June 2002. According to the Washington Post article, Comcast CEO Charles Ardir has stated that "the exclusive contract poses no barrier to Juno's deal." "Comcast, June Make Deal," *supra* at E4. The shifting positions of the cable companies should give the Commission considerable concern about the future of negotiated access when the heat is off.

that control access to a connection point between producers and consumers to adopt strategies designed to maximize the profit potential of that control.

Such strategies are readily available when the company in question is also one of the producers. It is clearly not in the interest of such a company to encourage competition at the producer level when it can use its control over access to confer a competitive advantage on its own production operation, or even exclude competing producers altogether. This is why rules designed to promote open access are necessary. As the FERC recently observed:

> It is in the economic self-interest of transmission monopolists, particularly those with high-cost generation assets, to deny transmission or to offer transmission on a basis that is inferior to that which they provide themselves. The inherent characteristics of monopolists make it inevitable that they will act in their own self-interest to the detriment of others by refusing transmission and/or providing inferior transmission to competitors in the bulk power markets to favor their own generation, and it is our duty to eradicate unduly discriminatory practices.

Regional Transmission Organizations, Notice of Proposed Rulemaking, 64 FR 31,390 (June 10, 1999), *FERC Stats. & Regs.* ¶ 32,541 at 33,682 (1999).

Another case in point is the strategy pursued by AT&T prior to the adoption by the FCC and the Antitrust Division of the Department of Justice of policies designed to open the telephone network to competing component providers. A key element of that policy shift was the requirement that AT&T unbundle the purchase of telephone equipment from its local telephone service and make its local telephone lines available on non-discriminatory terms to competing equipment providers. AT&T fiercely resisted those policies from their inception, seeking to protect what has been termed its "legacy" business mode based on a market structure under its control.[41] An array of telecommunication equipment alternatives developed thereafter.

[41] *See* Lemley & Lessig submission in AT&T/Media One proceeding ¶¶ 37-43.

In addition to policy experience, economic theory and common sense, actual experience in the cable industry demonstrates that vertically integrated cable system operators are unlikely to afford reasonable access to providers of competing services. Consider, for example, AT&T's highly publicized non-binding offer last year to negotiate open access arrangements with ISP Mindspring in Atlanta and its promise to negotiate later—*i.e.*, after expiration of its exclusive dealing arrangement with its ISP affiliate—with competing ISPs. Within days of AT&T's announcement, the offer was denounced by Mindspring itself as inadequate. Among other things, said Mindspring, there was too long a delay and no ability to use full streaming video capabilities. *Attachment* 5. See also, Vermont Telecommunications Plan, 2000 (August 2000) at 3-43. Others whom the Commission had brought into discussions with AT&T were similarly disappointed. As Media Access Project President Andrew Schwartzmann wrote in a letter to the Chairman on December 6, 1999:

> Several months ago, you asked me to meet with representatives of AT&T, Excite@Home, MindSpring, Atlanta Mayor Campbell and the FCC's Local and State Government Advisory Committee to with the goal of reaching agreement on a definition of "open access" in the cable broadband environment. I am among the three of these six people you called upon who have chosen not to sign the letter being sent to you today.
>
> In dozens of hours of conversation over the last four months, I tried to work constructively towards that objective. So did the others. The discussions were candid and sincere. I believe the participants acted in good faith at all times.
>
> ***It is with regret that I advise you that what AT&T describes in the letter being sent to you today by three of the six members of the group IS NOT "Open Access."***
>
> ****
>
> **1. Although AT&T owns 58% voting control of Excite@Home, it is hiding behind an "exclusive contract" to delay introduction of broader access for up to two and a half years, and perhaps much longer.**
>
> ****

To call this open access is like saying that on January 1, 1984, the day AT&T divested the local phone companies, there was competition in long distance services. The Commission should not allow a new monopoly to be created as it "watchfully" waits for competition.

2. Open access requires more than a choice of ISP's.

Open access requires that cable operators provide competing ISP's with full access to their systems under the same terms and conditions, and at the same rates, that access is available to affiliated ISP's. An operator should not be able to restrict offerings to those which its affiliate chooses to provide.

3. Requiring ISP's to use AT&T transport facilities permits content-based discrimination in favor of preferred content providers and commercial partners, and threatens to undermine the most valuable characteristics of the Internet: low entry barriers for nascent entrepreneurs, free expression and serendipitous innovation.

Throughout the discussions I attended, AT&T was unwilling to agree to let ISP's have access to connections at the cable head end. It instead insisted that ISP's use AT&T transport facilities all the way to the Internet backbone. The absence of an affirmative statement that ISP's cab connect at the head end is profoundly anti-competitive, and utterly at odds with what the Commission expects of all other telecommunications services. It particularly penalizes ISP's which own, or have long-term leases for, transport facilities, and which may have built their own regional nodes.

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Free expression includes the right not to receive access to unwanted material. Your strong support for the television v-chip ought to impel you to examine how closed access does not permit parents to use effective "server side" filtering by subscribing to "family friendly" ISP's. This problem is discussed in the brief Media Access Project co-authored in the Ninth Circuit Portland case: http://www.mediaaccess.org/filings/index.html#anchor44776

4. AT&T has abandoned its claims that it is not technologically feasible for cable operators to provide access to multiple ISP's.

Even as technologists at the highest levels of AT&T and Excite@Home were representing to me that there is no technological impediment to providing citizens with access to multiple ISP's, their lobbyists have continued to argue the contrary position before numerous state and local legislative and regulatory bodies. Indeed, a significant factor in my decision to withdraw from the talks you asked me to attend was the claim contained in an October 15, 1999 article by

> Excite@Home's General Counsel that "The technology simply does not yet exist to allow multiple ISPs to share a coaxial cable on a commercial basis."[42]
>
> ****
>
> **5. Open Access brings a better financial return for cable operators.**
>
> Competitive ISP's will generate more revenue for cable operators. They can market to, and provide better customer service for, citizens who might otherwise be left on the wrong side of the digital divide. For example, Cuban-Americans have different needs than Mexican-Americans and citizens of Puerto Rico. Cultural impediments may mean that a single ISP with one Spanish language marketing staff may plan will miss many of these new customers, leaving others outside the digital environment.
>
> ****
>
> **6. AT&T has been unwilling to make a written commitment that customers can purchase Internet access at commercially reasonable rates without having to buy a bundled "package."**
>
> Failure to permit independent purchase of Internet services threatens to expand the digital divide.

Attachment 6.

Not only were there obvious deficiencies in the AT&T promises outlined in Mr. Schwartzmann's letter, but the ink had barely dried on AT&T's offer when, on December 14, 1999, its cable chief, Daniel Somers, made clear that, whatever limited access AT&T might offer to competing ISPs, they would not be able to use AT&T cable lines to transmit streaming video over the Internet. Vermont Governor Dean detailed in a December 17, 1999 letter to Chairman Kennard both the problem with AT&T's watered down version of access and the fact that other cable companies weren't offering access to competitors at all:

> I, as others, have read of, and commend your efforts to encourage cable companies to open their systems to ISPs voluntarily. I also applaud your success in encouraging AT&T to commit -- albeit on a non-binding and limited basis -- to

[42] Daniel Pine, *Let the Feds Regulate*, at http://www.thestandard.com/article/ display/0,1151,7017,00.html A forceful rebuttal can be found in a two part article, Professor Lawrence Lessig, *Cable Blackmail*, at http://www.thestandard.com/article/0,1153,5198,00.html and *The Cable Debate, Part II*, at http://www.thestandard.com/article/0,1151,5621,00.html

> open its system sometime in the next few years. Even this limited change in AT&T's policy couldn't have taken place without the implicit threat of regulation that your efforts represented.
>
> Reliance on the voluntary cooperation of cable companies, however, even under the threat of regulation, simply isn't enough. For one thing, AT&T's promise is of no benefit to Vermont, where 90 percent of cable subscribers rely on Adelphia, a company that remains adamantly opposed to providing ISPs access to its system. As important, even AT&T has made clear that its voluntary commitments do not include allowing ISPs to offer video programming that would compete with its cable business. *Attachment* 7.

Attachment 18.

The next month, in January, 2000, open access lost another battle. One of its leading proponents, AOL, announced its merger with Time Warner and, on February 29, 2000 issued a non-binding, non-enforceable Memorandum of Understanding with Time Warner committing to non-discriminatory access for unaffiliated ISPs, a commitment that, it turns out, is very short on substance.

Press reports about Time Warner suggest that, like AT&T, Time Warner has little desire, and no willingness absent compulsion, to negotiate meaningful open access arrangements anytime soon. Like AT&T, and the cable industry generally, Time Warner has previously expressed opposition to open access on the grounds that its "negotiated" arrangements with affiliated ISPs pose a contractual bar, that open access is technically infeasible and that it will discourage investment in cable infrastructure. See, e.g., comments of Time Warner, Adelphia, Comcast, National Cable Television Association in Internet Ventures, Inc. Case Identifier No. CSR-5407-L. And, like AT&T, its willingness even to discuss such arrangements coincided with its need to obtain government approval of a major merger (in AT&T's case the merger with Media One and in Time Warner's case, the merger with AOL). Thus, Time Warner now expresses a willingness to negotiate voluntary access arrangements with unaffiliated ISPs, albeit in the form of non-binding assurances. Press reports indicate that the FTC has regarded those

assurances as insufficient, insisting on a *binding* open access commitment from Time Warner. *See Attachment* 8. Even Time Warner's limited undertaking, however, should be viewed with skepticism. It is well-settled proposition of antitrust law, applicable here, that management decisions made under the pressure of a government antitrust suit should not be given much weight. *See, e.g., U.S. v. Continental Can Co.*, 378 U.S. 441, 463 (1964); *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965); *FTC v. Proctor & Gamble Co.*, 386 U.S. 568, 576 (1967). Concern about undue reliance on such evidence is especially warranted where the conduct was, as here, subject to the control of the merging parties. *United States v. General Dynamics Corp.*, 415 U.S. 486, 504-05 (1974).

Serious questions, moreover, have been raised about the bona fides of Time Warner's voluntary commitment. According to an October 7, 2000 account in the Washington Post, while "Time Warner Inc. has offered nearly 40 Internet service providers in Texas access to its cable television lines," it has done so "only under conditions that would give the New York media giant a huge piece of their revenue and control over crucial content." "Time Warner Terms For Cable Criticized**,"** October 7, 2000 Page E01. Under a previously confidential[43] term sheet provided to some ISPs and attached as Appendix 9, Time Warner would receive 75 percent of the Internet service providers' revenue from all subscriber fees—which are often their biggest source of sales. Time Warner also would get 25 percent of the Internet service providers' revenue from other sources--such as advertising and other e-commerce fees—even though they

[43] Time Warner's insistence on confidentiality with respect to its term sheets is itself quite troublesome. As the Commission recently noted in *In the Matter of BellSouth Corp.*, FCC 00-389 (November 2, 2000), under Section 51.301(c)(1) of its regulations "a telecommunications carrier violates the duty to negotiate in good faith by "[d]emanding that another party sign a nondisclosure agreement that precludes such party from providing information requested by the Commission, or a state commission or in support of a request for arbitration under Section 252 (b)(2)(B) of the Act." *Id.* at ¶ 4. Overly broad non-disclosure agreements, the Commission added, "may well have anticompetitive effects." *Id.*

are financial transactions not directly related to Time Warner's cable business." *Id.* Time Warner would receive $50,000 as an upfront deposit and would get approval control over the Internet service providers' home pages and 'prominent above-the-fold areas on the home page of the service for use.' *Id.* Like AT&T, Time Warner would make it difficult for ISPs to compete in the provision of television-type programming. Moreover, if the Internet service providers offer telephone service over the Internet or video streaming, Time Warner would not be obligated to "provide [quality of service] support," according to the term sheet. That means that Time Warner would not be responsible should the service not respond fast or clearly enough. *Id.*

As detailed in the Micronomics report, the conditions contained in the term sheet are anticompetitive. *Attachment* 10.

The practices of AT&T/TCI provide similar cause for concern. Before its merger with AT&T, TCI offered to allow consumers to purchase third party ISP service, provided that the consumer agrees to continue purchasing the cable company's ISP service as well. This is a classic form of anticompetitive conduct. *See, e.g., Cajun Electric Power Cooperative, Inc. v. FERC,* 28 F.3d 173, 177-79 (D.C. Cir. 1994) (utility practice requiring its transmission customer desiring to purchase power from third party to continue paying for utility's now-unused generating capacity as well was form of tie-in agreement)[44]. There is no reason to believe that, absent regulatory compulsion, TCI or other cable companies will not continue such tactics[45].

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[44] Tie-ins, it bears noting, can be anticompetitive even where the party imposing the tie does not possess full-blown monopoly power, but nonetheless has the "special ability ... to force a purchaser to do something that he would not do in a competitive market," *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 13-14 (1984). *See* also, *United States Steel Corp. v. Fortner Enterprises, Inc.*, 394 U.S. 495, 504 (1969) (market power for purposes of tie in analysis is the economic power to impose the tie "with respect to an appreciable number of buyers within the market.") In rural communities, in particular, customers desiring high speed Internet service would have little choice but to purchase the service from the cable company's affiliate.

[45] A November 23, 2000 article in the Washington Post underscores this concern. The article, "AT&T Puts Open Access to the Test," Section E, p.1, describes an AT&T test of limited "open access" under which 500 residents of Boulder, Colorado are "receiving free service and a choice among eight Internet service providers (ISPs)."

That constraints on cable companies are necessary to protect the public interest is demonstrated by the numerous instances of anti-competitive behavior by cable companies and their ISP affiliates and the efforts to combat those practices being carried out by local franchising authorities and in the courts. The most recent such example of this is a class action lawsuit filed last year in the United States District Court, Central District of California, Western Division naming, as defendants, virtually every cable multi-system operator in the nation, including Time Warner and MediaOne Group ("MediaOne').[46] The suit also names as defendants ServiceCo L.L.C. (d/b/a RoadRunner) ("RoadRunner"), an ISP in which Time Warner and MediaOne hold interests, and At Home Corporation ("@Home"), another ISP in which the remaining MSO defendants hold interests.

The Complaint, filed by four customers of the Internet services provided by the defendants, notes that, pursuant to contracts between each MSO and its affiliated ISP, the MSO requires its subscribers who wish to purchase broadband Internet data transmission service from it to also purchase the Internet interface/consent service provided by its affiliated ISP (i.e., @Home or RoadRunner). These agreements compel a customer who desires service from an ISP not affiliated with the MSO-related ISP "to pay a supercompetitive price for Internet interface/content services and/or to purchase redundant Internet interface/content services sold by the [MSO's ISP affiliate] that he or she would not otherwise have purchased." Particularly in light of the technical superiority of cable broadband Internet transmission service to the

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Although given access to several ISPs, customers are unable to avoid the AT&T logo on their screens. More troublesome is the fact that AT&T has designed its access system to ensure that when customers "click on the 'Internet' window" (*Id.* at E15), they will be directed to AT&T's own browser. This, as the article notes, has raised concerns among ISPs that AT&T will use its browser to steer traffic to favored sites or make access to such sites faster. *Id.*

[46] The suit also names, as defendants, the following MSOs: AT&T, MediaOne Group, Tele-Communications, Inc., Cox Communications, Inc., Comcast Corporation, Jones Intercable, Inc., Cablevision Systems Corp., Arahova

narrowband service offered over standard telephone lines and the superior access into homes enjoyed by the cable systems, the Complaint observes that cable is dominant in the marketplace and that this state of affairs has harmed competition, in violation of various provisions of the Sherman Act, the Cartwright Act and California law. See attached complaint, *Attachment* 11. A similar complaint was filed in Pittsburgh, Pennsylvania by GTE.[47]

It bears emphasis that while the cases cited above, as well as the refusals to deal recounted in the attached affidavits of several ISPs constitute only evidence of complaints and not findings of wrongdoing by the cable companies, they are nonetheless relevant to the Commission's assessment of the state of the industry and the need for regulatory action. FERC's observations in its recently issued *Order No.* 2000, FERC Stats & Regs. ¶ 31,089 (1999) address this point directly:

> [T]he Commission considers allegations of discrimination, even if not reduced to formal findings, to be a serious concern for two reasons. First, this can be indicative of additional, unreported, discriminatory actions, because there are significant disincentives to filing and pursuing formal complaints that would result in definitive findings.[48] The NOPR expressed a concern that actual problems with functional unbundling may be more pervasive than formally adjudicated complaints would suggest. Second, the NOPR explained that allegations of discrimination are serious because, if nothing else, they represent a perception by market participants that the market is not working fairly. If market participants perceive that other participants have an unfair advantage through their ownership or control of transmission facilities, it can inhibit their willingness to participate in the market, thus thwarting the development of robust competition.

Communications, Inc. and Garden State Cable Vision LP. A copy of the Complaint is provided as *Attachment* 11 hereto.

[47] *See GTE Internetworking, Inc. v. Telecommunications, Inc., et al.*, No. 99-1737 (D.Ct. WDPa., docketed October 25, 1999).

[48] As noted in the NOPR, transmission customers are reluctant to make even informal complaints because they fear retribution by their transmission supplier; the complaint process is costly and time-consuming; the Commission's remedies for violations do not impose sufficient financial consequences on the transmission provider to act as a significant deterrent; and, in the fast-paced business of power marketing, there may be no adequate remedy for the lost short-term sales opportunities in after-the-fact enforcement. See FERC Stats. & Regs. ¶ 31,089 at 31,005.

FERC Order No. 2000, supra at 31,005.

The types of limitations on ISPs discussed earlier could not be imposed or maintained if the cable companies did not possess market power over transmission for ISPs and they underscore the need for regulatory intervention to protect competition as discussed in the attached Microeconomics Report. *Attachment* 10. Indeed, the notion that the cable companies do not possess market power over ISPs cannot be squared either with the Communications Act or the Commission's interpretations thereunder.

Consider, for example, the leased access provisions of the Act. The purpose of the leased access provisions is set forth in the statute itself: "to promote competition in the delivery of diverse sources of video programming *and* to ensure that widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems." 47 U.S.C. §532(a) (emphasis added) The statutory provisions of the Cable Communications Policy Act of 1984 ("1984 Cable Act") governing leased access were amended in 1992 due to legislators' "concern that some cable operators may have established unreasonable terms or may have had financial incentives to refuse to lease channel capacity to potential leased access users based on anti-competitive motives, especially if the operator had a financial interest in the programming services it carried."[49] This concern, however, was part of the 1984 Cable Act as well, since Congress recognized then, too, that promoting diversity and preventing the exercise of market power by cable operators could not be separated. *See Media Ranch, Inc. v. Manhattan Cable Television, Inc.*, 757 F. Supp. 310, 315 (S.D.N.Y. 1991).

[49] Cable Television Fact Sheet, Federal Communications Commission at 13-14 (August 1997)).

While the Commission has concluded that Internet Service is not "video programming" within the meaning of Section 612 of the Act, *Internet Ventures, Inc.*, "Memorandum Opinion and Order," File No. CSR-5407-L (Feb. 18, 2000), it has also acknowledged that it would face a different case if an ISP "proposed to utilize leased access capacity for the provision of a service comprised wholly of video programming available via the Internet." *Id.* at 8. The cable companies, have, in fact, been developing such Internet-based programming projects. *See Vermont Telecommunications Plan 2000 (August 2000), www.state.vt.us/psd/te100.htm, supra* at 3-45.[50] As noted, the statute already assumes that cable companies have market power over the transmission of video programming using cable lines. There is no logical reason, therefore, much less a statutory one, to conclude that cable would somehow lose this market power if the same lines were used to transmit Internet-based video programming rather than other, more traditional "video programming." To be sure, the Commission has held that when Internet-based video programming is coupled with other Internet services the resulting service is not "video programming" for purposes of leased access. It does not follow, however, that cable market power over unaffiliated video programmers would be altered solely because the video programming came coupled with email or web hosting offered by an ISP. On the contrary, the cable companies' ability to offer all of these services through their affiliated ISPs gives them added, not reduced, leverage over competitors.

B. Caching and Content Limits Are Evidence of Cable Company Market Power.

[50] The Vermont Telecommunications Plan 2000 discusses NBC's development of "Intertainer," a "new service that allows users with cable modems to order movies.. using a Web-like clickable interface." "Comcast, Sony, Intel and NBC," the report continues, "are all strategic partners in Intertainer. It is not a Web site channel, but a video on demand service delivered from a video server, received by cable customers on their PCs by using cable modems." *Id.* at 3-45.

In addition to retarding the development of Internet-based video programming, the Commission's "hands-off" policy will continue to permit cable companies to control content and advertisers through caching practices and the imposition of other restrictions:

> Even with open access arrangements in place, the cable company has control over the transmission of packetized data between its head end CMTS and the end user subscribers. Concerns remain over the potential for preferential treatment of data from affiliated providers. For example, a cable company with a co-marketing arrangement with one bookstore could use the capabilities inherent in its Cisco Internetworking software to prioritize packets from its affiliated bookstore, sending them downstream to the end users at full speed. Unaffiliated competitors' traffic, from other on-line book stores, for example, can be given lower priority and much slower transmission. As e-commerce sites increasingly utilize video streaming to present their products, sites relegated to the slow lane will be cumbersome if not impossible to use, compared to the more robust video transmissions of affiliated traffic assigned to higher priority fast lanes. For this reason, it is critical to establish requirements that ensure nondiscriminatory treatment of traffic.

Vermont Telecommunications Plan, *supra* at 3-44-45.

The NOI asks whether the current pledges by cable operators for future open access are specific enough to guarantee open access once they are implemented. *NOI* ¶ 39. The answer to this question is an emphatic "no." Just as the Commission has concluded that, in the absence of national, uniform and enforceable standards, ILECs "will continue to delay unreasonably" in providing non-discriminatory access to CLECs, *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket Nos. 98-147 et al., Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98 (Aug. 10, 2000), ¶ 22. (Collocation Order), so too does the absence of mandatory open access rules give cable companies license to frustrate and delay access to ISPs that compete with cable affiliates. Like ILECs, cable companies "have the incentive and capability to impede competition" through dilatory tactics. *See* Order on Reconsideration, ¶ 50. That is why firm rules, not voluntary

negotiating guidelines, are needed. Again, the FERC's experience with open access to electric transmission systems is directly relevant:

> [T]ariffs are essential to the provision of comparable services. Tariffs set out the services that are available and the terms and conditions under which those services will be made available....[In contrast], a negotiation process creates uncertainty and imposes on customers delay and other transaction costs that the transmitting utility members of an RTG do not incur when using the transmission for their own benefit. Moreover, the ability to execute separate transmission agreements with different but similarly situated customers is the ability to unduly discriminate among them. A tariff ensures against such discrimination in the RTG regional transmission group.

Southwest Regional Transmission Association, 69 FERC ¶ 61,100 at 61,398 1994)

While we can appreciate the Commission's expressed desire to minimize regulation of the Internet, to leave the *status quo* would constitute tacit approval of cable industry leveraging practices; i.e., the cable companies' use of their substantial market power in high speed transmission to secure customers for the Internet services offered by their affiliated ISPs. Cable companies such as AT&T have directly conceded the feasibility of providing access to multiple ISPs by indicating an intent to sign them up. By so indicating, cable providers also implicitly concede that providing access to their competitors will not discourage the deployment of broadband services. Allowing the cable industry to delay granting access for several years—the remaining term of the @Home exclusivity arrangements—will only serve to provide their ISP affiliates an unfair head start and a chance to entrench themselves in the market on a basis other than the merits of their service offerings.[51] Open access utilizing the leased access pricing model, on the other hand, would provide the Commission with an already established set of rules

[51] *See*, *e.g.*, Francois Bar, Stephen Cohen, Peter Cowhey, Brad DeLong, Michael Kleeman, John Zysman, "Defending the Internet Revolution in the Broadband Era: When Doing Nothing is Doing Harm" (Economy Working Paper 12 August 1999) at 16.

by which to mandate broadband cable access over cable channels and promote competition. The latter result is clearly in the public interest.

III. An Open Access Requirement Is In The Public Interest, Is Readily Implemented, and Is Consistent With Other Regulatory Policies. (NOI ¶ ¶ 25-31, 43-53)

Both this Commission and other regulatory agencies have long recognized that the companies they regulate can exert market power through exaction of onerous terms, as well as through unreasonably high prices. Indeed, where the regulated entity competes with its customers, regulators have found it is essential to be vigilant about exclusionary practices. This Commission's co-location rules are a prime example of agency regulation designed to limit the exercise of market power through the imposition of onerous terms and conditions of access. See, Collocation Order, supra.

If one were simply talking about a regulated conduit, regulation of rate levels might well provide the basic consumer protection needed against abuse of market power. Where, however, the conduit is also in the business of providing competitive goods or services that utilize the conduit facilities, terms and conditions take on added importance. The co-location regulations adopted by the Commission, for example, simply reflect the reality that ILECs not only have "last mile" market power, but utilize that "last mile" to provide advanced telecommunications services in competition with other entities that are reliant on those same facilities. The same phenomenon can be observed in other conduit or network industries. Thus, oil and gas pipelines have inherent incentives to favor their subsidiaries involved in the sale of oil and gas respectively.[52]

[52] *See FERC Order No. 497 FERC Stats. & Regs.* ¶ 30,820 at 31,129 (1988). Similarly, electric utilities owning transmission facilities and left to their own devices, historically refuse to provide access to companies competing with them in the sale of power or offered to do so only on terms and conditions that were onerous. *See FERC Order*

In *American Electric Power Service Corp.*, 67 FERC ¶ 61,168 (1994), the Federal Energy Regulatory Commission approached the same problem. In defining just and reasonable, not unduly discriminatory access, the overarching principle it adopted was a simple but powerful one. FERC announced that it would employ a "golden rule" to govern transmission access. Transmitting utilities would be required to provide service on terms and conditions and at rates no less favorable than they provided to themselves or their affiliates for the carriage of power. *Id.* That principle continues to underpin FERC regulation of electric transmission access.[53] Just as Congress concluded when it passed the 1996 Telecommunications Act, however, FERC concluded that additional steps were necessary to ensure nondiscriminatory access. Thus, it first ordered that all electric utilities file pro forma tariffs adopting standard terms and conditions of access as well as pricing methodologies. *Order No.* 888 at 31,734. It later concluded that those steps were inadequate and that unless more aggressive steps were taken to divorce transmission and power supply ownership, transmission providers would continue to favor the sale of their own energy products. *FERC Order No.* 2000, *FERC Stats. & Regs.* ¶ 31,089 at 31,015-17 (1999). The specific steps that FERC has chosen are, of course, peculiar to the industry it regulates. It is sufficient here to emphasize that the basic "golden rule" adopted by FERC is an equally useful construct to apply to cable access.

In its recently filed White Paper, NorthNet, a Wisconsin ISP, makes essentially this point. It suggests that, in the absence of a court proceeding, "the maximum rate for ISP use of 6 MHz

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No. 888, *"Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities," FERC Stats. & Regs.* ¶ 30,036 at 31,646 (1996); *aff'd in relevant part, Transmission Policy Access Study Group v. FERC*, 225 F. 3d 667 (D.C. Cir. 2000).

[53] *FERC Order No.* 888, "Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities," *FERC Stats. & Regs.* ¶ 30,036 (*passim)* (1996).; *aff'd in relevant part*, *Transmission Policy Access Study Group v. FERC*, 225 F. 3d 667 (D.C. Cir. 2000).

of spectrum should be set at the maximum implicit price paid by any entity for leased access to 6 MHz of spectrum for the delivery of cable programming." NorthNet White Paper at 13. This suggestion is well grounded in the statute and the Commission's regulations, as well as the record amassed by the Commission in *Internet Ventures, Inc.*, File No. CSR-5407-L (February 18, 2000). There, Internet Ventures and the Vermont Department of Public Service both maintained that Internet service providers offered video programming and hence were eligible for leased access under section 612 of the statute. They also provided evidence, unrefuted by other participants, that multiple ISPs could be accommodated on a single cable channel.[54] While the Commission held that the leased access provisions of the Act do not apply to ISPs, they are nonetheless helpful in defining non-discriminatory, just and reasonable rates, terms and conditions of service.

More specifically, although the Commission ultimately rejected the argument that ISPs provide "video programming" within the meaning of section 612, it recognized that video programming might well be delivered over the Internet and that, if an entity were engaged solely in the provision of video programming that was Internet-based, a different question would have been presented. *Internet Ventures, Inc.*, File No. 5407-L (February 18, 2000) ¶ 13. The upshot of that statement is that Internet-based video programming would be entitled to access to cable facilities under the implicit pricing standard established by the Commission's regulations governing leased access. In this regard it bears noting that cable operators characteristically set up their operations so that their affiliate's Internet service is available over one of the programming channels, "Internet Over Cable," FCC Staff Report at 80.

[54] *See* attached Affidavit of Frederick Enns, *Attachment* 13.

A. The Commission Has the Power to Abrogate The Exclusive Dealing Provisions of the Agreements Between the Major Cable Companies and Their Affiliates.

Among the obstacles to open access posed by the major cable companies is the alleged impediment posed by their exclusive dealing arrangements with their ISP affiliates, agreements that would lock competitors out of the market for periods of an additional year or more. These contractual provisions should be declared unjust and unreasonable and invalidated. The Commission has the plain authority to do so.

Modification of unjust and unreasonable contract terms is wholly within the Commission's powers. *Puerto Rico Telephone Co*., 92 FCC2d 274 ¶ 36 (1983) (striking down exclusive dealing arrangement in contract); *MCI v FCC*, 665 F.2d 1300 (D.C. Cir. 1981); *In The Matter Of Promotion Of Competitive Networks In Local Telecommunications Markets,* CC Docket No. 96-98, 2000 WL 1593327 (Oct. 25, 2000), ¶¶ 25-27; 163-64. Such relief is needed, moreover, where, as here, the exclusive dealing provisions are tainted by the monopoly power of the cable companies. *See, e.g., Associated Gas Distributors v. FERC*, 824 F.2d 981, 1017 (D.C. Cir. 1987) (interpreting comparable provisions of the Natural Gas Act to modify contracts that were the product of the pipelines' monopoly power.) As AT&T has stated, not only does the Commission have the power to void exclusive dealing provisions in contracts currently in effect (*Promotion Of Competitive Networks In Local Telecommunications Markets, supra* at ¶ 35), they perpetuate barriers to entry. *Id.* AT&T's comments in that case were particularly apt:

> AT&T has argued that for local competition to thrive among telecommunications carriers in commercial MTEs, building owners must be permitted to terminate their existing exclusive contracts and seek new relationships with competing carriers. Moreover, AT&T argues that the Commission has authority to void exclusive contracts that are currently in effect.

Promotion Of Competitive Networks In Local Telecommunications Markets, supra at ¶ 163.

B. Cable Open Access Will Create Competitive Pressure Between Cable and Other High-Speed Service Providers in Markets Where Cable Modem Service Faces Competition.

The Competitive Access Coalition urges the Commission to adopt a non-discrimination model that is cost-based and assures unaffiliated ISPs of access at prices, terms and conditions comparable to those the cable company offers to its affiliates.

In those limited areas where consumers have a choice between DSL and cable platforms to provide high-speed access to Internet service in the Washington metropolitan area, companies like Comcast have offered cable modem service at $39 per month, a price cable companies have touted as "competitive" with DSL service. Yet, as demonstrated elsewhere in these comments, a nonaffiliated ISP needs no more than a single cable channel to provide service to customers. Indeed, multiple ISPs can share the same channels since no customer is likely to purchase ISP service from more than one provider.

It is difficult to imagine that a cost-based access charge for cable modem service could be more than the cost of purchasing a premium channel of video programming from the cable operator—a price typically in the range of $10 or so. Even premium ISP service with its own proprietary content, from a provider like AOL or MSN, costs no more than $22 a month. If cable companies offered access to ISPs at $10 a month per ISP subscriber, the likelihood is that this would put downward pressure on DSL prices, since the cable modem service price would set the ceiling on a competitive price from DSL providers.

Thus, one benefit of a cost based open access model is that it would likely reduce the price for high-speed Internet access for those customers who do have limited competitive alternatives. Of course, as we have emphasized elsewhere in these comments, many consumers around the country, particularly in rural and low income urban areas, only have the cable modem alternative. However, to the extent that cable modem service provides competition to other

providers of high-speed access, a cost-based open access platform can only serve to help consumers by driving down the prices that high-speed competitors provide for access to their networks.

The model we suggest would include identical operations support systems interfaces for affiliated and unaffiliated ISPs. While interfaces may change with developments in technology, the surest way to enforce non-discriminatory access is to require that affiliated and unaffiliated ISPs receive the same functional access:

> The implementation of router-based technology known as policy-based routing would enable access by multiple service providers to the cable operators' high speed data networks. This would enable users to select their Internet service provider of choice, and have that provider's service transmitted over the designated Internet channel, somewhat akin to presubscription of a telephone number to a long distance telephone service provider. See the Canadian Cable Television Association's submission to the CRTC (the Canadian FCC) in response to Telecom Public Notice 98-9, the "Technical Report on Alternative Methods of Providing Access for Internet Service Providers," August 24, 1998.

Vermont Telecommunications Plan 2000 (August 2000), www.state.vt.us/psd/te100.htm, supra at 3-44 n. 302.

IV. Commission Forbearance Is Inappropriate (NOI ¶¶ 32-42, 53-56).

A. The Commission May Not Forbear By Inaction

The Ninth Circuit in *City of Portland* recognized that "the FCC has broad authority [under 47 U.S.C. §160(a)] to forbear from enforcing the telecommunications provisions if it determines that such action is unnecessary to prevent discrimination and protect consumers, and is consistent with the public interest," and left the Commission free to make such a determination in that case. 216 F.3d at 879-80. As the court observed, however, the statute requires that the Commission make the specified determinations as a predicate for forbearance; it may not simply fail to act.

In short, forbearance by inaction—what the Commission has referred to as its "hands-off policy"—is no longer an option. The Commission participated in *City of Portland,* and the Ninth Circuit's holding that cable access to ISPs is a telecommunications service is binding. "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of stare decisis, and we assess an agency's later interpretation of the statute against that settled law." *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). *See also, Bankers Trust New York Corp. v. United States*, 2000 WL 1346141 at 7 (Fed. Cir. 2000) ("[T]he Court's interpretation of a statutory provision trumps a subsequent agency interpretation that is inconsistent with the Court's precedent. The Supreme Court's reasons for adhering to its prior decisions in this context reflect the relationship of the Judiciary to Congress and the ability of Congress to change its statutes to correct a misinterpretation by the Court. These reasons would seem to apply equally to decision rendered by circuit courts of appeal").

Because cable access to ISPs is a telecommunications service, it is subject to the provisions of the Telecommunications Act of 1996 which, as the Ninth Circuit observed, "enacted a competitive principle embodied by the dual duties of nondiscrimination and interconnection." *City of Portland*, 216 F.3d at 879 (citing 47 U.S.C. §§201(a) and 251(a)(1)). *See also* 47 U.S.C. §153(43) ("A telecommunications carrier shall be treated as a common carrier . . . to the extent that it is engaged in providing telecommunications services").

The Commission cannot forbear from regulating the cable modem service or the cable platform in the present instance. Section 160(a) of the Act permits the Commission to forbear from regulating a telecommunications service only if the Commission makes an affirmative determination meeting the following criteria:

> (1) Enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for or in

connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) Enforcement of such regulation or provision is not necessary for the protection of the consumers; and

(3) Forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S.C. §160(a).

Finally, in determining whether forbearance from enforcing regulation is consistent with the public interest, the Commission must consider whether such forbearance "will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services." 47 U.S.C. §160(b). All of this must be done through the affirmative exercise of the Commission's powers, articulated in a written order. *See also* 47 U.S.C. §154(j) ("Every . . . official act of the Commission shall be entered of record").

B. There Is No Basis For a Commission Determination That Forbearance Is Appropriate

In the case of ISP access to broadband cable services, there is no evidence to support any of the determinations necessary for a decision to forbear, much less all three of them as the statute requires. To the contrary, economic theory, sound public policy, experience and common sense all counsel strongly in favor of imposing the common carrier duties of nondiscrimination and interconnection on cable systems insofar as Internet broadband services are concerned. A requirement of open access, like that imposed on other telecommunications services, is very much in the interest of promoting competition, protecting consumers and advancing the public interest.

Forbearance would be inconsistent with the Commission's policy of maintaining technological neutrality. Currently, in wireline telephony, the Commission regulates incumbent LECs by requiring that those carriers allow nondiscriminatory access to unaffiliated ISPs and allow interconnecting competitive local exchange carriers (CLECs) to provide DSL service. There cannot be a rationale for forbearance from regulating a telecommunications service in cable when DSL access is so regulated. Nor can the Commission achieve competitive neutrality by forbearing from regulating either cable or telephone wires, having very recently decided (in August 2000) to strengthen regulation of telephone wires because it found that DSL providers were not getting reasonable access.

Forbearance would also violate the statutory requirement that charges, practices and classifications in connection with the provision of telecommunications service are "just and reasonable and are not unjustly or unreasonably discriminatory." 47 U.S.C. §160(a)(1). Ample evidence is provided in these comments that, absent Commission action, a great potential exists for cable operators to engage in discriminatory practices with regard to providing ISPs with access to the cable platform. Similarly, it will be demonstrated that consumers, particularly rural and low-income consumers, will suffer the effects of discriminatory practices in the form of higher prices or lack of access to high speed services. *See* 47 U.S.C. §160(a)(2). Forbearance would ignore these adverse results, while preventing state utility commissions from addressing such issues on a local or regional basis.

Nor would forbearance "promote competitive markets" and "enhance competition among providers of telecommunications" services as required by 47 U.S.C. §160(b). To the contrary, there is every reason to believe, and abundant evidence to demonstrate, that cable system

operators have both the power and the incentive to foreclose innovative uses of broadband Internet technology, such as Internet-based video programming and video conferencing.

Finally, there is nothing on the competitive horizon to suggest that forbearance is appropriate. Competitive alternatives to cable for high-speed Internet access are few and limited, and the likelihood that open access will evolve as a result of market forces is small.

1. Forbearance Would Violate the Commission's Policy of Competitive Neutrality.

The NOI asks whether the Commission should attempt to achieve competitive neutrality by imposing the same particular requirements on competing providers of a given service, or should ensure only that the *overall* regulatory burdens imposed on such competitors are roughly equal. *NOI* ¶ 45. If the Commission means to suggest by this question that neutrality is achieved by measuring whether "overall regulatory burdens" are as onerous for cable companies as they are for telecommunications companies, then competitive neutrality would not only require adoption of an open access regime, but would require that cable company rates for video programming be *more* strictly regulated. Alternatively, it would mean that telecommunications providers should become *less* regulated in order to match the level of burden imposed on cable operators. Neither approach makes any sense.

If, on the other hand, the Commission is simply stating that competitive neutrality can be achieved if the same overarching principles of non-discriminatory access are applied both to telecommunications providers that own telephone wires and cable companies offering telecommunication services over their facilities, that approach may well make sense. The statute simply defines telecommunications providers by the type of service they provide, "regardless of the facilities used." 47 U.S.C. § 153(46). This does not mean that the Commission would ignore technological differences in the operations of different platforms. It simply means that the same

standards of non-discriminatory access at reasonable prices and under reasonable terms apply to all telecommunication services, irrespective of the facilities used to provide them.

This Commission has noted that, in the universal service context, the principle of competitive neutrality should include technical neutrality; competitive neutrality in this context means that support mechanisms and rules "should neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor or disfavor one technology over another." Joint Board Recommended Decision, 12 FCC Rcd at 101 (1996). As the Federal Energy Regulatory Commission has held in connection with analogous regulation of transmission access, a "national patchwork of open and closed transmission systems, with disparate terms and conditions of service" is undesirable. *Order No.* 888, *FERC Stats. & Regs.*, ¶ 31,036 at 31,673 (1996). As a matter of common sense, one would anticipate that application of the technological neutrality principle would mandate cable open access since the technological equivalent of cable access is DSL. Because DSL is subject to open access, cable should be too. Indeed, in rural areas like much of Vermont, where DSL is not available, denying open access to Internet service providers will not only undermine technological neutrality, it will exacerbate what the Administration has characterized as an already-troublesome "digital divide" between poorer and rural America and the more affluent in some of its larger urban centers.[55]

It is certainly true that "competitive neutrality" could be preserved as between cable and local exchange carriers if the Commission were to forbear from regulating access in *both* industries, but the cost to competition would be catastrophic. Just last year, when the cable open access debate was already raging, the Commission adopted collocation rules "to address charges

[55] *See*, "Falling Through the Net: Defining the Digital Divide (Report), http://www.ntia.doc.gov/ntiahome/digitaldivide (July 8, 1999). Race and income disparities that affect access to

that many incumbent LECs were improperly delaying, making more expensive, or precluding entirely the competitive local exchange carriers' (competitive LECs') physical collocation efforts." *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4761 (1999) (Advanced Services Report and Order), *aff'd, in part and remanded in part sub nom. GTE Service Corp. v FCC*, 205 F.3d 416 (D.C. Cir. 2000). The principal victims of these practices, of course, were competitive DSL providers upon whom many ISPs are dependent for high speed access. Indeed, the Commission has recently—and quite rightly—concluded, not merely that it should not forbear from regulating CLECs, but that it was necessary to *strengthen* the very rules it adopted just last year because "some incumbent LECs' collocation practices continue to impede competition." *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147 et al., Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98 (Aug. 10, 2000), ¶ 3. (Order on Reconsideration).

Having concluded just a few months ago that its rules were not strict enough to protect DSL providers who compete with ILECs, it would be inconsistent for the Commission to consider forbearing from regulation of advanced telecommunications as a means to "preserve" competitive neutrality between cable companies and local exchange carriers. Both the cable modem platform and DSL technology permit consumers high speed access to Internet service. They serve the same function, albeit utilizing different facilities. The Commission itself describes the importance of its collocation rules to ensure that the customer has "a choice of

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Internet service are plainly a focus of the Commerce Department's report, but as the Report also notes, "[a]t each

LECs from which to purchase advanced services." Order on Reconsideration at ¶ 10. Giving customers the same choice of ISPs should be an equally important regulatory priority for the Commission.

Even where it is available, of course, DSL provides at best a duopoly in the provision of high speed transmission service alternatives for ISPs and their customers[56]. Leaving consumers to the mercy of such limited competition through forbearance cannot qualify as a reasoned regulatory response. The only logical means to preserve competitive neutrality—as the Commission's own policy commands—is to order non-discriminatory access *and* to redress complaints that the access practices of cable companies "continue to impede competition" (Order on Reconsideration) with the same vigor the Commission has exhibited in regulating ILECs. Indeed, until now the Commission, by its inaction, has impeded, not preserved competitive neutrality. It would be hard for a dispassionate observer to conclude otherwise.

2. Forbearance Would Harm Rural and Low-Income Consumers

One of the greatest potential benefits of open access is its ability to extend the reach of broadband into rural and poor urban neighborhoods and to expand the use of broadband beyond traditional Internet browsing. In defense of restrictive access, cable companies argue that their affiliates will offer unrestricted access to Internet content. Thus, they argue, restrictions on

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income level, rural areas lagged behind urban and central city areas." Report, Appendix D.

[56] *See* Mason Report at 1. *Attachment* 15. For some residential users, DSL is available at speeds approaching that of the cable modem platform. The Vermont Telecommunications Plan notes, however, that DSL for many homeowners in Vermont is offered at speeds of 640 kbs, far below the typical speed of a cable modem. While such speeds are a vast improvement over dial up access, they are not adequate to support streaming video at a quality that can compete with programming from the cable companies and their affiliates. Thus, even if DSL were available to all cable subscribers, forbearing from the regulation of cable access would thwart the development of Internet-based competition for educational and commercial video programming carried by the cable companies, a point discussed earlier in these comments.

access to unaffiliated ISPs will not harm consumer choice. But this argument fails on several levels.

First, and most important to rural and low-income urban consumers, the cable company's argument assumes a static, narrow definition of Internet service. Unrestricted access to Internet content is important, to be sure. However, Internet service consists of more than web browsing. As mentioned earlier, Internet providers are distinguishable from each other in terms of the provision of proprietary content, web-hosting policies, e-mail services, access to news groups and caching, among other things.

Second, restrictions that the cable companies have insisted upon undermine the quality of potential Internet service to the particular disadvantage of rural and low-income urban users. The cable companies have insisted on restrictions on streaming video. *See, e.g.*, Time Warner term sheet, *Attachment* 9; Statement of Daniel Sommers, *Attachment* 4 (December 14, 1999 *USA Today*). This type of limit not only constrains consumer entertainment choice and competition for traditional television programming, it also limits the opportunities for home commuting and video teleconferencing. Indeed, some cable companies have placed limitations on uploading by home users designed to steer customers to separate business services sold by their telephone company affiliates.[57] Adelphia, for example, offers its *Powerlink* service in Vermont only "for home and family use"; barring, by tariff, the use of web space for "business oriented web pages." *Mountain Cable Co., VPSB Tariff* No. 2, §3, Subsection 9 (*Attachment* 3).

What this means, as a result, is that small businesses and telecommuters will be unable to use the affiliated ISP's service up to the capability of the network. By being denied the choice of

[57] *See Vermont Telecommunications Plan 2000 (August 2000), www.state.vt.us/psd/te100.htm* at 3-43.

ISPs who are willing to make their services available for such uses, the cable companies harm economic development.

The problem is compounded if customer access to alternative ISPs can occur only as the result of the cable companies' willingness to negotiate with rival ISPs regarding the terms of access. With per subscriber charges of $30, $40 and more per month, such as those suggested in Time Warner/AOL term sheet, high-speed Internet access will be out of the reach of most low-income users. On the other hand, cost-based access might be priced in the neighborhood of $10 per month or less.[58] At this rate, employers might well find it economic to subsidize access to employees, extending employment opportunities and eliminating commuting costs and child care expenses for those least able to afford them.

[58] Statement of Stephen Heins of NorthNet, *Attachment* 2.

3. Forbearance Would Retard the Development of Advanced Telecommunications Capability.

The NOI asks whether cable modem service is an advanced telecommunications service and whether there are any differences between advanced telecommunications capabilities, telecommunications facilities, and telecommunications services. *NOI* ¶ 22. The answer to both of the questions is yes. Moreover, as discussed below, defining the cable modem platform as an advanced telecommunications service, captures uses of the cable modem platform beyond a transmission mechanism for Internet service. The term "telecommunications services" is already defined in the statute as the offering of telecommunications to the public for a fee, regardless of the facilities used. 47 U.S.C. §153(46). Telecommunications refers to transmission of user-specified information to user-specified location(s) without a change in the form or content of the information. 47 U.S.C. §153(43). The term "telecommunications facilities" appears to connote the equipment, both software and hardware, used to provide telecommunications service. The term "advanced telecommunications capability" is an attribute of the transmission mechanism (in terms of transmission speed) used to provide the telecommunications service.

The cable modem platform is an advanced telecommunications capability as that term is defined under section 706 of the 1996 Telecommunications Act. Section 706(c) provides:

> (1) ADVANCED TELECOMMUNICATIONS CAPABILITY. - The term "advanced telecommunications capability" is defined without regard to any transmission media or technology, high as speed, switched, broadband telecommunications capability that enables users to originate and receive high quality voice, data, graphics, and video telecommunications using any technology.

Pub.L. 104-104, Title VII, §706(c), Feb. 8, 1996, 110 Stat. 153.

The Commission has expanded upon this definition. The Commission denotes as " 'high speed' those services with over 200 kilobits per second (kbps) capability in at least one

direction." *Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion ,* Second Report at ¶ 10, CC Docket No. 98-146, (rel. Aug. 21, 2000) ("*Second Broadband Report*"). The adopted bandwidth, which is approximately four times faster than the Internet access received through a standard phone line, is sufficient "to provide the most popular forms of broadband—to change web pages as fast as one can flip through the pages of a book and to transmit full-motion video." *Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion,* at ¶ 20, CC Docket No. 98-146, (rel. Feb. 2, 1999) ("*First Broadband Report*"). Moreover, the Commission interprets the phrase "enables users to originate and receive . . . telecommunications" as requiring two-way telecommunications. *Id.* at ¶ 21. The two-way communication and "switched communication" capabilities are key to advanced telecommunications capability. Accordingly, "neither a conventional cable television system nor a digital television signal, by itself, would be broadband within the statutory definition, for they are both one-way." *Id.* at ¶ 20.

In the *Second Broadband Report,* the Commissioned refrains from using the term broadband to describe any of the categories of services on facilities described in the report, as it had done in the *First Broadband Report*, *Id.* at ¶ 11. Instead, it defines "advanced telecommunications capability" as the capability to support a speed (*i.e.* bandwidth) in excess of 200 kbps in both the downstream and the upstream directions. In effect, advanced telecommunications capability, which is capable of 200 kbps or greater in both directions, is a subset of high speed services. *Id.*

As stated, when cable operators offer Internet access, they are providing a telecommunications service. The issue then is whether the telecommunications service they provide qualifies as advanced telecommunications capability. They do.

Cable operators have the capability to provide Internet access at maximum downstream speed of 27 Mbps and maximum upstream speed of 10 Mbps. *Second Broadband Report* at ¶ 33. These speeds are well in excess of the 200 kbps required to satisfy the "high speed" criterion of advanced communications capability. Moreover, cable operators typically significantly upgrade their facilities to accommodate transmission of Internet service. Such upgrades include upgrade of both their fiber optic and coaxial cable facilities and increase the system's transmission capacity to 550 MHz or to 750 MHz. *Second Broadband Report* at ¶¶ 30-31. In addition, the cable operators install equipment—such as routers, switches and cable modem termination systems—that enables transmission of digital data packets. *Id.* Accordingly, the high speed capacity, combined with all of the other features, makes the cable modem platform an advanced telecommunications capability.

Defining the cable modem service or the cable modem platform as an advanced telecommunications capability captures all uses of cable modem service beyond the provision of Internet access. Indeed the Commission has recognized that the breadth of opportunities brought about by advanced telecommunications capability also permits telecommuting, consumer-originated broadcasting, distance education, desktop publishing and healthcare. *Id.* at ¶ 12. Specifically:

> With advanced telecommunications capability consumers can take advantage of advanced services that allow residential and business customers to create and access content, sophisticated applications, and high-bandwidth services. For example, advanced services allow businesses and their customers quickly to exchange data over long distances, doctors to provide real-time diagnosis to patients in remote areas, people with hearing and speech disabilities to

> communicate through video links using sign language, teachers to create interactive multimedia learning environments for their students, and individuals to have faster, more robust access to the Internet.

Second Broadband Report at ¶ 12. Thus while Internet access is a useful function of the cable platform, as an advanced telecommunications capability, it is useful for many other purposes. Forbearance from regulation of cable modem service would stifle competitive advancements in the provision of services that rely on advanced telecommunication capability for delivery to consumers.

4. Forbearance Would Deprive the Public of the Benefit of Television-Like Programming that ISPs Can Provide in Competition with Cable Companies.

Another way in which unaffiliated ISPs are likely to benefit consumers is through the provision of Internet-based streaming video and video conferencing. Indeed, absent an open access regime, cable operators are likely to do everything in their considerable power to thwart the development of Internet-based streaming video that competes with their core cable business of video programming. (The statements of AT&T executives, discussed infra, and the Time Warner term sheets (discussed *supra*, bear this out.) Nor, absent regulatory compulsion, are cable companies who plan to enter local telecommunications markets likely to permit ISPs to offer video conferencing or telecommuting services to small businesses or employees. (*See Mountain Cable Company, VPSB Tariff No. 33.4 § 9.1, Attachment* 3. The cable companies, while opposing streaming video, have made the disingenuous argument that ISPs do not offer a real substitute for video programming anyway. In *Internet Ventures*, *supra*, Comcast argued that ISPs cannot offer video programming comparable to broadcast television because the Commission itself has stated that "streaming video… is 'not comparable in quality to broadcast

video' in a technological sense."[59] Comcast went on to quote the Commission's statement in the Fifth Competition Report that "industry observers believe video streaming is unlikely to… compete with traditional video media in the foreseeable future."[60]

The argument that these statements by the Commission render moot any concern about retarding the development of new services makes no sense. The Commission's recitation of industry prognostications—even its belief at the time in their validity—is irrelevant if, *in fact*, streaming video can now provide a picture of a quality comparable to that of broadcast television. As VDPS pointed out in its initial comments in *Internet Ventures*, *supra*, that *is* the case where ISPs have access to the high speed connections possible over cable facilities.

The convergence of broadcast and Internet technologies means that differences in the video experiences between broadcast television and Internet video over cable are disappearing. Beyond the image itself, the total programming experience possible with digital television looks increasingly like Internet video programming. As Internet Ventures noted in File No. CSR-5407-L, the Commission's rules permit television broadcast stations to provide telecommunications services such as the "transmission of data, processed information, or on any other communication in either a digital or analog mode" on the vertical blanking interval and in the visual signal.[61] In other words, with digital transmissions, TV moves into the computer age. Digital TV is TV recorded and transmitted digitally; TV that can come with web pages or come from web pages. It is enhanced with other media elements and interactivity. It can be watched on a TV or a PC. One can no longer think of cable TV as it has been in the past—delivering

[59] Comments of Comcast Cable Communications at 6, citing Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Fourth Annual Report, 13 FCC Rcd. 1034, 1094 at ¶ 97 (1998).

[60] Fifth Competition Report, 13 FCC Rcd. ¶ 105 at 24350-51 (1998).

[61] 47 C.F.R. §73.646(a).

only the cable TV channels we know in the formats we grew up with—but instead we must recognize cable TV as it is and as it will be--delivering all that we are familiar with plus new television formats we are only beginning to see emerge on the cable dial. *Shapiro Affidavit, Attachment* 1, at ¶ 4, ¶ 11 and ¶ 12. These new formats include digital television with accompanying data streams, television for viewing on personal computer monitors, and television from the cable's Internet channels.[62]

With the advent of digital technology, there is no longer any scarcity of channels, another factor that will hasten convergence of Internet and broadcast video programming. Total channel capacity after rebuild of the Adelphia system, for example, is 413 channels. (The additional 200 MHz digital capacity gained with rebuild yields 33 six MHz channels, when compressed at a 10 to 1 ratio = 333 channels + 80 analog channels = 413 channels.) *Shapiro Affidavit* at ¶ 5. This number of channels, in fact, is expected to increase significantly with improved compression techniques and eventual digitalization of the analog channels, yielding ten or more digital channels from each former analog channel's bandwidth. *Id.* Even the bandwidth hungry High Definition Television (HDTV) digital format fails to fill a single 6 MHz analog channel; four HDTV signals can be transmitted over a 6 MHz channel. *Id.* All this suggests that broadcast television and Internet video programming will only continue to merge in their comparability as

[62] Intel, for example, is working with NBC, PBS and others to provide Web pages over the vertical blanking interval (VBI) of a regular broadcast or cable television transmission. Intercast could provide statistics with sporting events, recipes with a cooking show, print information with a news report, or coupons with advertisements. Shapiro Affidavit at ¶ 9. PBS ran its first Intercast programming on November 10 and 11, 1998, in a Ken Burns documentary about Frank Lloyd Wright that featured accompanying data streams for the personal computer that were transmitted simultaneously with the show. The PBS Kids Channel launches in September, 1999 with Intercast capabilities as a basic component of the new programming. The programming is aimed at PCs that will be equipped with an Intel receiver card coming to retail suppliers this summer. An alternative to a set top box, it will enable PCs to receive both the digital television transmissions and the accompanying data streams. (See Reveaux, Tony, "Kids Lead PBS' Digital Charge," TV Technology, 4/7/99, p. 18.) See Shapiro Affidavit at ¶ 9.

the features and benefits of both are integrated into video programming of the future[63] - - if cable systems are required to provide non-discriminatory access.

The programming content of Internet video over cable is comparable to that of traditional video programming over cable. According to Internet Ventures, its subscribers could activate a "prominent button on the home page of Internet Ventures' ISP's to access the PeRKInet® portal," which will provide them access to 75 Internet-delivered television broadcast stations from both international and national sources.[64] International and out-of-region broadcasts, VDPS would note, are not typically offered by cable providers as part of their channel line up and their availability from Internet providers using cable can significantly add to programming diversity. *Shapiro Affidavit* at ¶ 13. *Attachment* 1.

In Case No. CSR-5407-L, Internet Ventures provided other examples of the overlap in video programming available on the Internet and on broadcast television that we will not repeat here. Rather, we simply emphasize that there can be no question that the Internet offers a significant and substantial amount of live and on-demand video programming that, with high speed access, is capable of competing with programming provided by cable companies.[65]

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[63] *Shapiro Affidavit* at ¶ 11, *Attachment 1*. One leading brand, Cisco's IP/TV, is a comprehensive "client server software application that transmits video programs, both live and pre-recorded to desktop PCs over enterprise IP networks." It is extremely bandwidth efficient and works well over 10 or 100 Base T Ethernet, and cable modems. Using IP Multicasting, it can "transmit a scheduled video broadcast to an unlimited number of viewers without straining network performance." It enables viewers to type in questions and it can broadcast Powerpoint slide presentations alongside video images of a speaker, for example. *See Shapiro Affidavit* at 1, *Attachment 1*.

Hughes Electronics, the owner of DirecTV – plainly a provider of video programming, "is in negotiations with Broadcast.com to provide its current Direct PC satellite Internet service users with custom tailored programming....Broadcast.com has twice before worked with Direct PC on special projects. The latest, a special 400 kbps video feed of a Forbes magazine event designed specifically for Direct PC users, took place earlier this month." (Bannan, Karen J., "Hughes Beams Up Two-Way Satellite," Inter@ctive Week, March 22, 1999, p. 7). Shapiro Affidavit at ¶ 10. Attachment 1.

[64] *See* Internet Ventures, Inc., News Release (April 20, 1999). See Exhibit B of the IVI petition for a printed copy of the PeRKInet ® channel line-up (as of May 17, 1999).

[65] Dobie Gillis is on weekday mornings at http://www.broadcast.com/television/shows/dobiegillis/. NASA TV transmits a live video feed 24 hours a day on http://www.broadcast.com/events/nasa/. CSPAN can be watched on

Consumers will not benefit fully from these developments, however, unless the Commission ensures open access that not only guarantees comparable treatment between affiliated and unaffiliated ISPs, but also does not favor the cable company's video programming or telecommunications business.[66]

Cable companies plainly fear this competition. It is one of the reasons they have opposed true open access. Leo J. Hindrey, Jr., former CEO of AT&T Broadband and Internet Services, made statements that both (1) contradict claims that ISPs cannot offer streaming video comparable video programming available over broadcast television and (2) underscore the need for mandatory open access. At a television forum, Mr. Hindrey stated that he would not allow streaming video to undercut AT&T's cable business:

> I am not going to allow it to trash the fundamental model without being a participant in the debate on how it evolves . . . . I am not against streaming, but I am against streaming that destroys the business that I have spent billions and billions of dollars, ten of billions building. So I am not going to let that happen. That would be foolish.[67]

Not long after Mr. Hindrey's departure, his successor, Mr. Daniel Somers, made the same point. He described AT&T's opposition to the use of its cable lines to transmit Internet-based

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cable TV or over the Internet at http://www.cspan.org/. Statehouse proceedings in the state of Washington are available for viewing at http://www.TVw.org. See http://www.broadcast.com for listings and links to video programming available online. Every website has the potential for its own TV broadcast and the list of channels is growing daily and is certain to far exceed that of cable television.

[66] Regular dial up Internet service, by contrast, offers no realistic prospect of offering competition in video programming for the cable companies. According to the National Cable Television Association Guidelines, presented by Adelphia in response to discovery requests VDPS submitted in proceedings before the VPSB, cable reduces the time to transmit a single 1 Mb graphic image from 5 minutes over a telephone line with a 28.8 kb/s modem to 1 second using a 10 Mb/s cable modem. "The cable industry's broadband network enjoys a significant advantage over competitive alternatives for accessing the vast amounts of information available on the Internet." (DPS 2-15 /FCC docket 98-146, 1A(1)) *See Shapiro Affidavit* at ¶ 6, *Attachment 1*.

[67] Ted Hearn, "AT&T's Hindrey: Streamed Video Could Trash Cable," Multichannel News at 25 (October 4, 1999) (Exhibit D thereto).

movies and TV shows as follows: "AT&T didn't spend $56 billion to get into the cable business to have the blood sucked out of our vein."[68]

The video provided over the Internet is comparable to that offered by television stations, the very programming also distributed by cable systems. If "streaming video" were not comparable to the video programming service that Mr. Hindrey has "spent billions of dollars, tens of billions building," it could pose no competitive threat to cable, much less one that would "destroy the business." Indeed, the comments of Mr. Hindrey and of his successor make clear that the cable companies' strategy to limit streaming video on the Internet services provided by their affiliates was designed to limit competition in the video type programming that ISPs can provide.

5. Limited Actual or Potential Competition to Cable System Operators Does Not Justify Forbearance and Is Inconsistent With the Commission's Own Definition of "Effective Competition."

The Commission posits two conditions under which open access might be mandated: (1) where the "cable operator is the only facilities-based provider of high-speed services and it owns or controls the ISP providing service to end-users" and (2) where "there is an actual or potential competitor to the cable operator." *NOI* ¶ 42. The Commission then poses a series of questions related to the second scenario, presumably because the answer to the first one is obvious—namely that if the cable operator has a complete monopoly on facilities-based provision of high-speed services open access must be mandated. This section of these comments, therefore, will address only the questions posed with respect to the second scenario.

[68] *See Attachment 4* (December 14, 1999 edition of *USA Today).*

The basic question the Commission asks is "should the Commission intervene if there is *an* actual or potential competitor to the cable operator." *NOI* ¶ 42 (emphasis added.) The wording of the question suggests that the Commission believes the presence of a single alternative provider of high-speed services could alter the conclusion about whether open access requirements for cable operators is needed. By any economic standard, the presence of an incumbent and a single competitor would not be sufficient to create a competitive market. The existence of a single *potential* competitor is even farther removed from a competitive market. The studies cited elsewhere in this pleading discuss the fact that, at best, cable operators will face significant competition only from DSL providers. In other words, they will be competing in what would effectively be a duopoly. *See Micronomics Report, Attachment 10.* Even the presence of another significant competitor, however, would not alter the conclusion that open access is essential on cable systems. The history of regulation is replete with examples.

Consider, for example, the leased access provisions of the Act. Cable operators face competition in the provision of video programming from over-the-air broadcasts. Indeed, over-the-air broadcasts, it is safe to say, can reach a higher percentage of the population than DSL service. This fact notwithstanding, Congress has concluded that cable companies have market power in the provision of video programming and has mandated that cable companies make a portion of their facilities available to independent video programmers. The logic that the mere existence of an alternative provider would justify abandoning open access would mean that there would be no reason to mandate leased access on cable facilities since over the air broadcasts exist as an alternative.

Similarly, the notion that a single new competitor serving some limited segment of the same market as the incumbent, would constitute viable competition, is inconsistent with the

Commission's own application of the "effective competition" provisions of the 1996 Act. In "Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996," CS Docket No. 96-85, Report and Order (Released March 29, 1999), 64 FR 35948 (July 2, 1999), ("Cable Act Reform Order"), the Commission addressed the question of when a cable company would be subject to "effective competition" and hence exempt from rate regulation. More specifically, it addressed the application of the 1996 Act's Amendment to Section 623(l) of the 1992 Cable Act, 47 U.S.C. § 543(l)(1)(D), governing competition from local exchange carriers (or their affiliates) offering video programming over LEC facilities. The Commission emphatically rejected arguments that cable companies would face "effective competition" from LECs if customers in *any* portion of their service area could choose LEC video programming. *Id.* ¶ 9. "So lenient a test," it stated, "could have the unfortunate result of allowing a dominant cable company to raise rates, unabated by regulation or genuine competition, whenever an LEC delivers video signals to just one home in the franchise area." *Id.* "Until [effective] competition exists," it added, "monopoly providers of services must not be able to exploit their monopoly power to the consumer's disadvantage." *Id.* For effective competition to exist, it concluded, "the LEC's service must substantially overlap the incumbent cable operator's service in the franchise area." *Id.* at ¶ 10.

It bears emphasis that LEC competition in the provision of video programming depends on the use of DSL or like technology. Thus, "effective competition" for cable-delivered video programming does not exist nearly anywhere in the United States, at least in part, because DSL is not widely-enough deployed.[69]

[69]As Mr. Shapiro's affidavit in Internet Ventures makes clear:

Regulation of DSL access teaches the same lesson. The Commission requires facilities-based telecommunications providers to offer non-discriminatory access to their facilities. The beneficiaries of this policy include DSL providers that compete with the local telephone companies to provide high-speed access to Internet service and, more importantly, ultimate consumers. If the mere existence of alternative high-speed providers were sufficient to prove that open access is not required, then the existence of cable modems should be sufficient to justify a conclusion that open access for DSL providers is unnecessary.

In many metropolitan areas around the country, gas distribution companies have long been connected to more than one interstate natural gas pipeline. *Lynchburg Gas Co. v. FPC*, 336 F. 2d 942, 949-50 (D.C. Cir. 1964). And, while interstate pipelines must receive certificates for

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The DPS has sent 45 questions on DSL to every local exchange carrier (LEC) in Vermont. Current plans to offer DSL service in Vermont are limited to Vermont Telephone Company, which plans to offer the service throughout its service territory, and Bell Atlantic ("BA"), which plans to offer it out of its Burlington and Essex switches. Other companies express interest but their plans remain speculative. None of the companies in Vermont have filed tariffs with the FCC, a necessary step prior to offering service, inasmuch as DSL service falls under interstate jurisdiction.

Several technical problems have also been identified which will make deployment problematic. Service provisioned out of the central office is limited to distances of 18,000 feet and will not travel over digital loop carriers (DLC). (25% of BA lines travel over DLCs and these are not eligible for DSL.) Old copper may also be problematic and limit the number of lines eligible for DSL service. Indications are, therefore, that DSL deployment will be limited and the cable platform will be the only available broadband drop into most cable homes in Vermont for the foreseeable future. Most residents living in Adelphia territory will be able to have broadband access from Adelphia, but outside of downtown areas in the larger markets, few Vermonters can expect an alternative broadband service over copper in the next five years.

Shapiro Affidavit at ¶ 7, ¶ 8, Attachment 1.

Little has changed since the time Mr. Shapiro submitted his 1999 affidavit. *See Vermont Telecommunications Plan 2000 (August 2000), www.state.vt.us/psd/te100.htm* at 2-53-58. ("Because DSL is both distance and "loop make up" sensitive, there are technical qualifications as to how many lines would actually be eligible for any form of DSL. Currently 26% of Bell Atlantic's lines travel through digital loop carriers and would therefore be unable to provide DSL provisioned out of their central offices, as Bell Atlantic plans. An additional unknown percentage of lines would also be disqualified due to lengths greater than 18,000 feet from the central office. Other lines, numbers unknown, would be unable to carry DSL due to copper quality, shielding, crosstalk and interference. These DSL issues recall the problems of ISDN deployment, such as distance from the central office (CO) and sufficient customer demand to drive deployment of the interface from the central office to nodes closer to customers.")

As the Vermont Telecommunications Plan 2000 concludes, the problems inherent in DSL deployment mean that Vermont is likely to have only limited DSL availability for the immediate future. Vermont Telecommunications Plan, *supra* at 2-57. In Wisconsin, over 90 percent of customers with high speed access rely on cable. *See attached* Statement of Stephen Heins. *Attachment 2*. More importantly, even assuming the widespread availability of DSL (it is not even available to the signatories of this pleading who all reside in large

authorization to provide transportation service, the certificates are non-exclusive. *Panhandle Eastern Pipe Line Co. v. FPC*, 169 F. 2d 881, 884 (D.C. Cir.), *cert. denied*, 335 U.S. 854 (1948). This fact notwithstanding, the rates, terms and conditions of service provided by natural gas pipelines continue to be regulated under the Natural Gas Act.

The history of electric power regulation is similar. A single electric utility typically provides distribution of electric power to end-users in a given franchise area. And, although, by state law, utility franchises are typically nonexclusive[70] and although utilities face potential competition from municipalities that have the power of eminent domain,[71] the rates, terms and conditions of distribution service continue to be regulated. Until early in the last century, the predominant means of consumer protection in the electric industry was the threat that an existing utility would be displaced when its franchise expired or if the municipality in which it was located exercised the power of eminent domain. P. Fox-Penner, "Electric Utility Restructuring: A Guide to the Competitive Era," in Pub. Util. Rep. 95 (1997) ("the awarding of franchises, for often for short periods or non-exclusively to promote competition, was the primary means of controlling the industry."). States ultimately concluded that, while this competition was helpful, electric distribution possessed natural monopoly characteristics and that while franchise competition ought to be nurtured, regulation was nonetheless necessary.[72] Indeed, there is a recurrent theme in utility regulation reflecting the notion that, even in a regulated industry competition should play a significant part. *See, e.g.*, *Otter Tail Power Co. v. United States*, 410

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metropolitan areas), there is no principled argument that competitive neutrality should be preserved by regulatory forbearance.

[70] *See Tenn. Elec. Power Co. v. TVA*, 306 U.S. 118 (1939).

[71] *Puget Sound Power & Light Co. v. Seattle*, 291 U.S. 619, 626 (1934).

[72] S. Breyer, Regulation and Its Reform, 15-16 (1982); *Farmers Union Central Exchange, Inc. v. FERC*, 734 F. 2d 1486, 1508 (D.C. Cir. 1984), cert. Denied, 469 U.S. 1034 (1984).

U.S. 366 (1973); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *McLean Trucking Co. v. U.S.*, 321 U.S. 67, 86 (1944); *Georgia v. Pennsylvania R.R..*, 324 U.S. 439 (1945); *Northern Natural Gas Co. v. FPC*, 399 F.2d 953 (D.C. Cir. 1968); *Nat'l. Broadcasting Co. v. United States*, 319 U.S. 190, 223-24 (1934); *United States v. Radio Corp. of America*, 358 U.S. 334, 351 (1959); *Metropolitan Television Co. v. FCC*, 289 F.2d 874, 876 (D.C. Cir. 1961); *General Tel. Co. v. U.S.*, 449 F.2d 846, 858 (5th Cir. 1997).

The lessons of these experiences are applicable here. A competitive market in the provision of high-speed access does not exist and is not likely to exist in the foreseeable future. Mandating open access over cable systems in these circumstances is therefore necessary. Regulation, moreover, is not at all inconsistent with the promotion of regulatory policies that will encourage development of competition for cable companies in the provision of high-speed access. The Natural Gas Act encourages development of competition between pipelines, but recognizes that each pipeline continues to exert market power sufficient to justify regulation. Similarly, the fact that electric utilities need to be regulated does not mean that regulators do not encourage competition to keep the regulated utility on its toes. *See* Reiter, Competition Between Public and Private Distributors in a Restructured Power Industry, 19 Energy L.J. 333 (1998). More ISP "pipes" into the home is also a good thing, but until there is a competitive market for high-speed access, there will be a need for regulation.

Two subsidiary questions contained in the NOI suggest some possible confusion about this basic concept. For example, the Commission asks whether there would be any competitive harm from the denial of open access "if ISPs seeking access to the cable modem platform offer services that are not different from or more attractive to consumers than those provided by the affiliated ISP." *NOI* ¶ 42. We already know that ISPs differ greatly from one another (in

caching, proprietary content, offers of newsgroup access, web space, web hosting, etc.), but even if alternative ISPs would offer the same services as the affiliated ISP, consumers would at least be interested in whether competitors would offer those services at a lower price![73]

The Commission has also asked how imposing open access would "comport with the Commission's historical policy of not regulating the Internet." No proponent of open access, so far as we are aware, has remotely suggested any intent to regulate the content of the Internet or to regulate Internet service. On the contrary, they are in unanimous agreement that Internet service ought to remain an information service unregulated by the Commission. As the Ninth Circuit has stated, however, what cable modem affiliates provide is Internet service bundled with a telecommunication service, i.e., the transport medium by which the Internet service provider gains access to the consumer. It is as simple as that.

V. Arguments Questioning the Feasibility of Open Access Should be Rejected.

A. Technological Feasibility.

An open access regime must, of course, be consistent with technological limits. It bears emphasis, however, that monopolists often seek refuge in arguments of technical infeasibility when confronted with threats to their market share. *See, e.g., Otter Tail Power Co. v. U.S.*, 410 U.S. 366, 377 (1973); *MCI v. AT&T*, 708 F.2d 1081, 1133 (7th Cir. 1983). The Commission should therefore treat any such claim with healthy skepticism. There is, as important, ample evidence to support the conclusion that cable systems are capable of supporting a robust, competitive ISP market:

[73] The question, in fact, seems to disregard what the Commission must already know. ISPs differ from one another on a whole range of services, from web hosting, to proprietary content, to streaming video alternatives. Price, of course, is a major distinguishing feature as well.

> While the approach taken by Canadian regulators plainly cannot govern the Commission's decision here, it is instructive on this issue. In contrast to our domestic experience to date, Canada has mandated that cable companies offering Internet service must provide access to non-affiliated third party providers of Internet service.[74] The Canadian experience is relevant because both US and Canadian cable Internet providers will be operating under the same DOCSIS cable modem platform standards.

See Shapiro Affidavit, Internet Ventures, Case No. lSSR. 5407-L at ¶ 19. *Attachment 1.* What works technically for Canadian systems, in other words, will also work for the American systems.

The Vermont Telecommunications Plan 2000 reaches a similar conclusion:

> Open Internet access over cable is mandated in Canada; the technical procedure for achieving a routing solution is based on connecting one router hop beyond the CMTS. 303 Regional Cable Systems has been providing its customers a choice of up to four ISPs since September 1999 at one of its three systems where open access has been implemented. Canada conforms to DOCSIS standards and a DOCSIS certified cable modem purchased for use in Vermont will work over Canadian cable systems. Likewise, packet switching solutions for a DOCSIS-compliant Canadian cable network will work the same for an American one.

Vermont Telecommunications Plan, *supra* at 3-44.

Attached as *Attachment 13* to these comments is the August 9, 1999 affidavit of Frederick Enns submitted in *Internet Ventures*, *supra*. As Mr. Enns, Chief Technical Officer for Hybrid Network, Inc. notes, there are "two wide solutions that enable any operator of a network to implement leased access" (affidavit, ¶ 5): "source routing" and "tunnelling." *Id.*, ¶¶ 9-13. Both methods allow an essentially unlimited number of ISPs to share a single cable channel, with the customer designating its choice of ISP. *Id.* "Source routing requires no new technical developments and it is compatible with the network equipment of the cable operator." *Id.* at

[74] *See Regulation Under The Telecommunications Act Of Cable Carriers' Access Services*, Canadian Radio-Television and Telecommunications Commission (CRTC)File No.: 8697-C12-02/98 (July 6, 1999).

¶ 10.[75] Tunneling also, involves use of existing technology, but does require software updates to the cable modem. *Id.* at ¶ 13.[76] The details of both approaches are discussed in Mr. Enns' affidavit.

When used in the cable modem connection context, *interconnection* refers to the junction point at which the unaffiliated ISP connects with the cable network in order to provide Internet access. To understand the junction points where ISPs can interconnect along the cable network, it is first necessary to detail the design of a data-capable cable network. The *headend* is the local cable facility that receives the satellite signals from the satellite network operated by the cable operator. Located at the *headend* is the *cable modem termination system* ("CMTS"). The CMTS is a type of *router* that moves Internet packets around. The signals are transmitted via *trunks* stretching from the *headend* to various sections of the cable franchise area (typically a city or county), with a *branch network* extending from these *trunks* going through the neighborhood to *tap* the *cable box* or *set-top box* in each house. Between the *headend* and the *trunks*, there are *nodes*, which allow fewer branches and houses to be fed by each *trunk*.

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[75] Source routing has been widely implemented in Internet access routers. Each ISP subscriber has an address ("source address") that is associated with a particular ISP. The *routers* filter packets by identifying the address that is associated with the subscriber's particular ISP and directing the Internet packet to that particular ISP. *See Affidavit of Frederick Enns* at ¶ 9.

[76] Tunneling can be used to provide leased access over a shared cable plant channel. Under tunneling, an IP packet addressed to some computer in the Internet is placed inside a packet addressed to the ISP operator of the subscriber. *See Affidavit of* Frederick Enns at ¶ 12. Attachment 13. The cable operator's router then sends the IP packet to the ISP using its normal destination routing algorithm. Each ISP receives packets only from its subscribers. It then takes these packets, removes the outside envelope and sends the inside packet to the destination address. *Affidavit of Frederick Enns* at ¶ 12. Attachment 13.

Tunneling requires additional software in the cable modem to add the tunneling envelope upstream, but most cable modems on the market today, have the capability to receive new software programs over the cable network. *See Affidavit of* Frederick Enns at ¶ 13. Tunneling is generally used by businesses for Intranet purposes. Even though businesses share the network connection of the Internet, they are given the appearance of a virtual private network. *See Affidavit of* Frederick Enns at ¶ 11. Attachment 13.

The two most reasonable places for interconnection to occur are at the *headend* or one router hop beyond the *headend.* The CMTS, located at the *headend,* is the "primary interface node for the local cable Internet infrastructure" and is "the most likely point to interconnect independent ISPs." See The Architecture of Internet 2.0, www.edventure.com/release_I /cable.html. ISPs can connect to different portals at the CMTS, at which point the Internet packet received from the subscriber's home would be filtered through the CMTS and taken up by the ISP.

Alternatively, unaffiliated ISPs can create private peering relationships "between backbones[77] one router hop beyond the CMTS." *Vermont Telecommunications Plan 2000 (August 2000),www.state.vt.us/psd/te100.htm* at 3-43. These private peering[78] relationships eliminate the congestion at the NAPs by dropping the Internet packet off earlier to the destination backbone where the equipment for both ISPs is located rather than traveling to one of the dozen major exchange points within the U.S. *Id.*

There are two options for ownership of these routers. The first is that the cable company can put a stackable interface router that would be shared by all entrants. *See Shapiro Transcript Before the State of Vermont Public Service Board*, November 4, 1999, (hereinafter "*Shapiro Transcript*") at p. 21. *Attachment 14.* The benefit of this is that if the cable company runs out of ports, it can add another one or the ISP can put in their own router. *Id. Attachment 14*. Alternatively, the ISPs can share at their expense through a point of interface router where the initial ISP would put in a router and allow other ISPs to plug into it. *Id. Attachment 14.* This

[77] Internet backbones are groups of communications networks "managed by several commercial companies that provide the major high-speed links across the country. ISPs are either connected directly to these backbones or to a larger regional ISP that is connected to one. The backbones themselves are interconnected at various NAPs." *Tech Encyclopedia,* www.techweb.com

[78] Peering occurs when one Internet backbone provider transmits or accepts traffic from another national provider.

interface router limits the burden of the cable companies to have enough routers to accommodate all ISPs because the ISPs would be responsible for paying and maintaining the routers, which are then connected to a port in the CMTS. *See Shapiro Affidavit.*

Generally speaking, the closer the interconnection to the subscriber's home, the faster the data transmission occurs because the data has fewer routers to pass through to get to the Internet. When there are fewer routers to pass through, the information or data is transmitted more directly to the Internet backbone, which results in less traffic along the way. However, given the technical complexity of this matter, deciding which is the technically superior location to interconnect is better decided during a rulemaking procedure.

Under source routing and tunneling, desented earlier, individual subscribers may access multiple ISPs simultaneously. A single channel downstream and upstream can support about 7,500 Internet service subscribers with high speed access. Since the cable plant architecture feeds signals to many individual nodes within the plant, many separate groups of 7,500 subscribers each can be serviced by reserving one channel leased to multiple ISPs. Thus, a cable plant in a metropolitan area with one channel reserved for Internet access can serve over a hundred thousand subscribers. *Affidavit of Frederick Enns* at ¶ 15. *Attachment* 13.

Cable operators should offer the same bandwidth and quality of service to unaffiliated ISPs as to their own affiliates. *Id.* at *Attachment 14.*

Under an open access regime, the cable company would be responsible for network management and the unaffiliated ISP will be responsible for customer service. The goal is for the cable operator to have no control over the Internet content available to subscribers. Each ISP should be in control of the content offered to its individual subscribers. As in telephony, a cable operator's function is to provide the means for transport. By the ISP's maintaining control over

the content available to its subscribers, it will be responsible for providing customer service, protecting subscriber privacy and providing Internet access to its subscribers. Only in this way can accountability to the subscriber be ensured.

Having the cable operator control the ISP's homepage could lead to undesirable results. Using the example of Time Warner-AOL (TWC) as representative of the current system, it is clear that open access with no control by the cable operator is needed to ensure quality customer relations and customer privacy.

In its White Paper, NorthNet uses the term sheet provided by TWC to demonstrate that, under the present system, TWC regulates the content of the ISP's homepage and leaves open the opportunity to advertise its services on the unaffiliated ISP's homepage.

> ISP will have sole control of, and responsibility (including without limitation editorial and technical responsibility) for the homepage for the Service, provided however that (a) the home page will be subject to TWC's approval; and (b) at all times during the term of the Definitive Agreement there will be a dedicated availability of prominent above-the-fold areas on the home page of the Service for use by the Operator at its discretion, but which may, without limitation link to content, applications, service and functionality by such Operator.

In addition, the TWC term sheet demonstrates that it wants to control the privacy policy of unaffiliated ISPs so that they conform to the privacy policies of TWC.

> TWC shall use reasonable efforts to comply with ISP's customer privacy policy Practices, provided, however that to the extent ISP's privacy policies are inconsistent with, and in some way a limitation on TWC's current and anticipated business use of such information, ISP agrees to take whatever action necessary to modify its policies with respect to conform with TWC's business practices.

TWC would most likely not be alone in its desire to discourage competition from unaffiliated ISPs. Thus, it is important that cable operators' function be limited to providing the transmission facilities so as not to interfere with the protection of subscriber policy and to deter the imposition of onerous rules by cable operators on the ISPs (which will defeat the purpose of open access). In other words, access is not truly "open" if the cable operator can still control.

If NorthNet or a similar ISP signs the agreement proposed in TWC's term sheet, TWC will have the ability to effectively control the ISP by regulating the content on its homepage, thereby ensuring that TWC stays ahead of its competitors who lease its cable lines and offers the "better" Internet access.

B. Economic Feasibility.

A major contention of the cable companies is that if they are required to provide leased access to ISPs, their incentives to invest in cable infrastructure improvements will be diminished to the disadvantage of consumers.[79] The argument, no doubt, is intended to tap into concerns expressed by the Chairman that the Commission should not take actions that retard or discourage investment in competing broadband technologies. This argument, however, should be rejected.

The Competitive Access Coalition is just as concerned as the Commission about encouraging competing broadband technologies to develop. Neither the empirical evidence nor logic suggests that granting access to ISPs will discourage cable companies from investing in broadband technology expansion. In fact, logic dictates the opposite conclusion.

VDPS, one of the signatories to these comments, noted, for example, in its initial comments in *Internet Ventures*, *supra*, that the Canadian communications regulatory authority mandates open access on cable facilities to ISP providers. A July 13, 1999 article in *Investor's Business Daily* reported that Microsoft has agreed to invest $400 million in Rogers Communications, a Canadian cable company that will be providing access to multiple ISP providers, including Microsoft.[80] Another article appearing in the same newspaper reported that AT&T itself is investing time and effort in developing capacity sufficient to handle the traffic

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[79] *See*, e.g., *Internet Ventures, Inc.*, Case No. lCSR-5407-7, Comments of Comcast Cable Communications at 18; Comments of AT&T Corp. at 22; Comments of Time Warner Cable at 20.

[80] *Microsoft Forms Alliance on Interactive Television*, INVESTOR'S BUSINESS DAILY at A1 (July 13, 1999).

from multiple ISP use of cable facilities.[81] One could argue that AT&T was simply hedging its bets. However, if open access were really the investment disincentive that the cable companies claimed, they would simply decline to offer ISP service altogether. See also, Jeffrey K. Mackie Mason, "Investment in Cable Broadband Infrastructure: Open Access is not an Obstacle," Univ. of Mich., Nov. 5, 1999) *Attachment* 15 (hereinafter "*Mason Report*"). Among other things, Professor Mason notes the statement of the Canadian Cable Television Association that it "is committed to the implementation of third party access, in large part because it is in the cable companies' financial interests." *Mason Report* at 1 (quoting Reply Comments of the Canadian Cable Television Association in PN 98-14, 10/30/92, p. 2 (http://www.crtc.gc.ica/Internet/1998/8697/c12/02/ccta/981030ofc.doc)). (Emphasis added) Statements last year from AT&T CEO Armstrong also undercut the investment disincentive argument. An October 6, 1999 article in the *New York Times* reports that AT&T is now apparently willing to provide access to its broadband cable facilities, "but it cannot move quickly to open its cable networks because of a contract that obligates it to give exclusive cable access until 2002 to the Excite@Home Corporation."[82] AT&T has stated that it intends to provide such leased cable access only after its contract with

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[81] *AT&T Working to Eliminate Glitches in Cable Net Access. Id.* at A4. The article describes AT&T's position as follows:

If AT&T Corp. opens its cable network to rival Internet service providers, will it have enough bandwidth to go around?

AT&T says yes -- despite some early problems with cable access in the San Francisco Bay area. AT&T says its high-speed network can handle millions of potential users, though its system would need to be engineered differently.

"There is no capacity issue," said AT&T spokesman Mark Siegel. "The (cable) modems are traffic engineerable to accommodate any user demand that you're forecasting. *We plan to stay ahead of the curve*."

Id. (emphasis added).

[82] Seth Schiesel, "AT&T Seeks to Deflect Internet Criticism," The New York Times (Oct. 6, 1999) <http://www.nytimes.com/library/tech/99/10/biztech/articles/06accesshtml>.

Excite@Home expires.[83] When AT&T's exclusive arrangement with @Home ends in 2002, the *Wall Street Journal* reports AT&T CEO Michael Armstrong as saying, it will "welcome *as well as pursue* multiple vendors on its broadband network."[84] The same article also states that AT&T has been meeting with MindSpring Enterprises, Inc, Atlanta city officials and with FCC officials to devise an access plan in Atlanta.[85]

That non-discriminatory access will not discourage investment in cable infrastructure was emphasized in the affidavit of former Telecommunications Planner for VDPS, William Shapiro, in *Internet Ventures*, Case Identifier CSR-5407-L:

> Cable companies enjoy a temporary technological advantage over other competing forms of high speed technologies that they have every incentive to seize upon. Currently, Hughes offers a hybrid service, DirecPC, offering 56kb/s upstream via telephone modem and 400kb/s downstream via satellite. These are speeds that still are less than the speeds available from cable. Cable companies state that their modems can offer an approximate speed of 10 Mb/s downstream, touted for up to 30 Mb/s, with slower upstream speeds varied and priced accordingly. To be sure, companies like Hughes Electronics have announced plans to offer higher speed satellite services - speeds higher than current cable speeds - but these plans, like Hughes' Spaceway service, are still several years away from deployment. Cable companies are not likely to squander the opportunity to reach new subscribers for high speed Internet service when there is such a premium in enrolling new subscribers first. I should add that, while competition from satellite companies to offer higher speed Internet connections is a good thing, it does not diminish the importance of protecting competition among Internet service providers. Satellite/cable competition will help to limit monopoly pricing of the "pipe" into the home, but it won't assure vigorous competition among ISPs (or between cable company video programming and video programming offered by ISPs).

Paragraph 4 *Attachment* 17.

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[83] *Id.*

[84] Leslie Cauley, "AT&T's Leo Hindery Resigns As Chief of Cable, Net Business (Oct. 7, 1999) http://interactive.wsj.com/archive/retrieve.cgi?id=SB939214967688976380.djm (visited on October 9, 1999) (*emphasis added*). *See also* Peter S. Goodman, "Leading AT&T Cable Executive Resigns Departure Raises Doubts About Company's Expansion Plans" Washington Post (October 7, 1999; Page E01) http://search.washingtonpost.com/wp-srv/WPlate/ 1999-10/07/131l-100799 -idx.html(visited on October 9, 1999).

These statements refute cable industry claims of technical infeasibility. Moreover, Mr. Armstrong's statement that AT&T intends to "*pursue*" arrangements with third party ISPs also discredits cable claims that access conditions will discourage cable investment.

Consider the illogic of the cable companies' argument. Under Section 612 of the Act, a cable operator is entitled to reasonable compensation from those who lease its cable capacity.[86] It bears emphasis that, as applied by the Commission, this standard does not provide the traditional cost-based compensation a regulated utility would be allowed under a "just and reasonable" rate standard.[87] Rather, cable companies will continue to enjoy the considerable pricing flexibility that has allowed them to raise overall rates regularly and with seeming impunity. Under the Commission's implicit pricing standard, regulation of leased access rates simply assures the lessee that it will pay no more than a proportionate share of what the cable company implicitly charges itself and "that a fair leased access rate should compensate the operator for the "implicit fee" it would have earned had it not been required to lease the channel."[88] The purpose of this generous standard is to promote diversity without the creation of a financial burden on the cable operator.[89] "It may be, as Professor Mason argues, "that, as AT&T claims, it will earn even higher profits if permitted to monopolize Internet service over its broadband cable. However, more profit than the already extraordinary profit available from open-access broadband may make AT&T shareholders happy, but it is clearly not a justification for reducing competition or for reducing broadband investments." *Mason Report* at 2,

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[85] Leslie Cauley, "AT&T's Top Cable Executive Resigns Amid Internet-Access Fracas," The Wall Street Journal at B1, B4 (Oct. 7, 1999).

[86] *ValueVision Int'l, Inc. v. FCC*, 149 F.3d 1204, 1207 (D.C. Cir. 1998).

[87] *Id.* at 1208.

[88] *Id.* at 1207.

[89] *Id.* at 1209.

Attachment 15. *See also* F. Bar, S. Cohen, P. Cowhen, B. DeLong, M. Kleeman, J. Zysman, "Access and Innovation Policy for the Third-Generation Internet," Telecommunications Policy, Vol. 24 (July/August 2000). (Bar Study) (*Attachment* 16).

Internet traffic is growing at rapid rates. If, as cable operators argue, other broadband technologies will try to secure a share of Internet traffic on their networks, cable companies stand to lose by not attempting to do likewise. Why then, would they want to deny access to their facilities to companies willing to pay for use of cable capacity? The only logical answer is that they believe they can earn supra-competitive returns on their own broadband ISP services. That, in turn, would only be possible if they believed they faced only limited competition from other broadband providers—at least in significant portions of their service areas. In fact, that is a very sound assumption.

First, as MIT Professor Jerry A. Hausman details in his October 28, 1998, affidavit submitted in CS Docket No. 98-178,[90] cable companies have significant market power in the delivery of video programming over high speed multi-channel distribution networks. This market power, he notes, makes it profitable for cable companies to tie the delivery service to the provision of service by their unregulated ISPs, like @Home and RoadRunner. *See also* Bar Study at 13-26, *Attachment* 16; *Mason Report*, *Attachment* 15. Cable companies not only have access to high speed connections to facilitate customer purchase of ISP service from cable affiliates, they have high speed Internet access to allow purchase of their video programming. In Vermont, Charter Communications offers Internet Service, but only if the customer buys basic

[90] "Joint Applications of AT&T Corporation and Tele-Communications, Inc. for Transfer of Control to AT&T of Licenses and Authorizations Held by TCI and Its Affiliates or Subsidiaries."

cable service. Adelphia, the other major cable operator in the state, charges $10 more per month for its ISP service if the customer does not purchase basic cable.

Further, as Vermont noted in its initial comments in *Internet Ventures*, *supra*, there are two other types of broadband technologies that may be available to consumers. These include DSL available over telephone wires and high-speed data communications over satellite. The former, as Vermont noted earlier, is not technology that will be available anytime soon to rural customers or even to many customers in more densely populated areas.[91] As to broadband technology using satellites, cable companies have a technological time advantage. Satellite companies are not expected have true high speed broadband ISP service available for several years.[92] Cable companies are not likely to squander this competitive leg up simply to keep competing ISP providers from using their cable facilities. On the contrary, since cable companies will receive remuneration from ISPs for the leased access they provide, cable companies will have every incentive to sign ISPs up and to expand their plant in order to keep ahead of their broadband competitors. Moreover, as Professor Mason notes, satellite is a "lower quality option" and "fairly expensive." *Mason Report, supra* at A-4. *Attachment 15.* Denying leased access to ISPs will not spur new investment in broadband technology, it will only serve to give cable-owned ISPs an unfair competitive advantage, depriving communities of programming diversity, more competition and choice of ISP services in the process.

The Commission should not confuse competition in the provision of broadband services—a desirable but distinct goal—from competition among ISPs. ISP service is not a

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[91] *See Vermont Telecommunications Plan 2000 (August 2000), www.state.vt.us/psd/te100.htm*, at 2-53-58 (August 2000) http://www.state.vt.us/psd/tel2000full.pdf. *See also* Bar Study at 19 (describing high switching costs associated with --- from cable to DSL); *Mason Report* at A, A-3-4, *Attachment 15*.

[92] ***See Attachment 14.***

fungible commodity[93] and competition among ISP providers will benefit consumers just as competition to provide the pipe into the home will do so. The Commission does not face an either-or choice between encouraging competition in broadband and facilitating competition among ISPs.

The market power of cable providers over high-speed access is self-evident. In a competitive marketplace, sellers, except for reasons of creditworthiness or the like, do not ordinarily turn down customers when they have the inventory or capacity to serve them. There is no logical reason, other than a desire to suppress competition from unaffiliated ISPs or from Internet based video programmers—and an expectation that this course would be effective—for the cable operator to forego reasonable compensation for use of its capacity.[94] The ability to make exclusionary practices stick is the essence of market power.[95]

[93] *See*, e.g., *Bar Study*, *supra* at 30 (differences in streaming video, web listing, cashing, price, proprietary content, newsgroup access.

[94] As discussed, *infra*, the Commission's regulations plainly entitle the cable operator to reasonable compensation for capacity offered under leased access arrangements.

[95] *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946) (monopoly power is the power "to raise prices or to exclude competition when it is desired to do so").

CONCLUSION

For the reasons stated above, the Commission should take prompt affirmative steps to enforce the common carrier obligations of cable systems to provide non-discriminatory access to their cable modem platforms.

Respectfully submitted,

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